# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. 95.

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J. E. HURLEY, CYRUS LELAND, JR., AND WALTER REEVES, TRUSTEES IN BANKRUPTCY OF THE ESTATE OF THE MOUNT CARMEL COAL COMPANY, BANKRUPT, APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COMPANY, AND THE CHEROKEE & PITTSBURG COAL & MINING COMPANY.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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FILED MAY 23, 1907.

(20,728.)

(20,728.)

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*vs.*

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1906, of said Court, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday in December, to-wit: the third day of December, A. D. 1906, before the Honorable Walter H. Sanborn, Honorable William C. Hook and Honorable Elmer B. Adams, Circuit Judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest:

JOHN D. JORDAN,
*Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to-wit: on the twelfth day of April, A. D. 1906, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the District of Kansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The Atchison, Topeka and Santa Fe Railway Company *et al.*, were Appellants, and J. E. Hurley *et al.*, Trustees in Bankruptcy, etc., were Appellees, which said transcript of record is in the words and figures following, to-wit:

1 In the District Court of the United States for the District of Kansas First Division.

In re The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy No. 816.

Citation.

To J. E. Hurley, Cyrus Leland Jr., and Walter Reeves, Trustees in Bankruptcy of the Estate of The Mount Carmel Coal Company, Bankrupt, and Clifford Histed and J. S. Dean, your Solicitors,—Greeting.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the District Court of the United States for the First Division of the Judicial District of Kansas, wherein The Atchison, Topeka and Santa Fe Railway Company; The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company, are appellants, and you, J. E. Hurley, Cyrus Leland Jr., and Walter Reeves, Trustees in Bankruptcy of the Estate of The Mount Carmel Coal Company, Bankrupt, are appellees, to show cause, if and there be, why the judgment rendered against the said appellants,as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John C. Pollock, Judge of the District Court of the United States for the District of Kansas, this 12th day of March in the year of our Lord one thousand nine hundred and six.

JOHN C. POLLOCK
United States District Judge, for the District of Kansas.

We accept service of above Citation this 12th day of March, 1906.

CLIFFORD HISTED
JOHN S. DEEN,
Solicitors for Appellees.

Filed March 12-1906. Morton Albaugh, Clerk. By F. L. Campbell, Dep. Clerk.

2 In the District Court of the United States for the District of Kansas First Division.

In the matter of Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

To the Honorable John C. Pollock, Judge of the District Court of the United States, for the District of Kansas:

The petition of C. E. Denham, C. S. Gill and J. Davis, all of Kansas City, Missouri, respectfully shows that the Mount Carmel Coal Company, of Topeka, Kansas, has for the greater portion of six months next preceding the date of filing this petition, had its principal place of business, resided and had its domicile at Topeka, in the County of Shawnee and State and District aforesaid, and owes debts to the amount of over one thousand dollars. That said Mount Carmel Coal Company is a corporation organized and existing according to law, and is engaged chiefly in mercantile pursuits, mining, buying and selling of coal. That your petitioners are creditors of said Mount Carmel Coal Company, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of five hundred dollars. That the nature and amounts of your petitioners claims are as follows:

C. E. Denham, on an acceptance for seventeen hundred and twenty-four dollars, dated Topeka, Kansas, April 29, 1905, and payable sixty days thereafter, to the order of Joseph Fletcher, which acceptance has been duly assigned and said Denham is now the owner and holder thereof, said acceptance being drawn and accepted for value received passing to said Mount Carmel Coal Company.

3 C. S. Gill, on an acceptance for seventeen hundred and twenty-four dollars, dated Topeka, Kansas, April 29, 1905, and payable sixty days thereafter, to the order of Joseph Fletcher, which acceptance has been duly assigned and said Gill is now the owner and holder thereof, said acceptance being drawn and accepted for value received passing to said Mount Carmel Coal Company.

J. Davis, upon an acceptance for twenty-seven hundred and thirty-eight dollars, dated Topeka, Kansas, June 22, 1905, and payable sixty days after date to the order of Joseph Fletcher, which acceptance has been duly assigned and said Davis is now the owner and holder thereof, said acceptance being drawn and accepted for value received, passing to said Kansas City Coal & Coke Company.

The three acceptances above set out were all duly accepted by the Mount Carmel Coal Company, and all remain unpaid.

Your petitioners further represent that said Mount Carmel Coal Company is insolvent, and that within four months next preceding the date of this petition the said Mount Carmel Coal Company committed acts of bankruptcy, in that it did heretofore, to-wit, on various dates during the months of April, May and June, 1905, pay to various creditors various sums of money for the purpose of preferring such creditors over their other creditors, and that during said months of April, May and June 1905, and while insolvent, said Mount Carmel Coal Company did pay out many thousands of dollars to one C. J. Devlin without any consideration passing to said Mount Carmel Coal Company therefor, but wholly for the use and benefit of said Devlin.

Wherefore your petitioners pray that service of this petition with a subpoena may be made upon said Mount Carmel Coal Company as provided in the acts of Congress relating to bankruptcy, and that it may be adjudged by the court to be a bankrupt within the purview of said acts.

4

C. E. DENHAM.
C. S. GILL.
J. DAVIS.
By W. S. McClintock, Karnes,
New & Krauthoff,
Their Attorneys.

State of Missouri,
County of Jackson—ss.

G. W. Solan being duly sworn, upon oath states that he is one of the attorneys for the petitioning creditors herein, and as such and for them makes this affidavit, being thereunto duly authorized. This affidavit is made by this affiant because the matters and facts hereinbefore set forth are more fully within the knowledge of this affiant than within the knowledge of any of the Petitioning creditors or any of the other officers, agents, or servants thereof. The matters and facts hereinbefore set forth are true.

G. W. SOLAN.

Subscribed and sworn before me this 28th day of July, 1905. My commission expires May 10th, 1908.

LATHROP KARNES. Notary Public.
Seal N. P. Jackson County, Missouri.

Endorsed: No. 816. In Re Mount Carmel Coal Company, Bankrupt. Involuntary Petition. Filed July 28, 1905. at 3:40 P. M. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk, U. S. District Court, District of Kansas.

Subpoena to Alleged Bankrupt.

5 United States of America, District of Kansas.
First Division.

To Mount Carmel Coal Company, in said District, Greeting:

For certain causes offered before the District Court of the United States of America, within and for the District of Kansas, First Division, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside, and notwithstanding any excuse, that you personally appear before our said District Court, to be holden at Topeka, in said District on the 17th day of August, A. D. 1905, then and there to answer to a petition filed by C. E. Denham, C. S. Gill and J. Davis, in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf, And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable John C. Pollock, Judge of the said Court and the seal thereof, at Topeka, this 28th of July, day A. D. 1905.

Seal U. S. D. C.

MORTON ALBAUGH.
Clerk U. S. District Court, Districtof Kansas.

By F. L. Campbell, Deputy Clerk.

U. S. Marshal's Return.

District of Kansas, ss. Received the within writ Topeka, Ks. the 28th day of July, A. D. 1905, and executed the same as follows, to-wit: Served on the within named Mount Carmel Coal Company by delivering to C. J. Devlin, President of said Company, personally, a true and certified copy of this writ with all endorsements thereon, at Topeka, Kansas, July 28,
6 1905. At the same time and place, and in like manner, I delivered to C. J. Devlin, President, an original copy of the petition in bankruptcy filed in this case.

WILLIAM H. MACKEY JR.
By B. F. FLENNIKEN,
Fees: $4.10. Chief Office Deputy.

Endorsed: No. 816. District Court United States, District of Kansas. C. E. Denham et al. vs. Mount Carmel Coal Company. Bankruptcy Subpoena. Returnable Aug. 12, 1905. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk. Filed July 29, 1905, Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk. Karnes, New & Krauthoff, Compt's Sols.

7 In the District Court of the United States for the District of Kansas First Division.

In the Matter of Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

At Topeka, in said District, on the 17th day of August, A. D. 1905.

And now the said Mount Carmel Coal Company appears and denies that it has committed the act of bankruptcy set forth in said petition, or that it is insolvent, and avers that it should not be declared bankrupt for any cause in said petition alleged, and it demands that the same may be inquired into by a jury.

MT. CARMEL COAL COMPANY,
By Chas. J. Devlin, Pt.

State of Kansas
County of———ss

I, Chas. J. Devlin, being duly sworn, upon his oath states that he is President of the Mount Carmel Coal Company, and makes this affidavit on its behalf; that he has read the foregoing denial of bankruptcy, and that the matters and things therein stated are true.

CHAS. J. DEVLIN.

Subscribed and sworn to before me this 31st day of July, A. D. 1905. My term expires 1-12-1907.

Seal N. P. C. P. BOLMAR,
Notary Public.

Endorsed: 816. In Re Mount Carmel Coal Company. Involuntary Bankruptcy. Denial in Bankruptcy. Filed August, 17, 1905. at 2-30 P. M. Morton Albaugh, Clerk. U. S. District Court, Dist. of Kansas. By F. L. Campbell, Deputy Clerk. Harkless, Crysler & Histed, Lawyers, Kansas City, Mo.

8 In the District Court of the United States for the District of Kansas First Division.

In the matter of Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Now on this day it appearing to the Court that heretofore there was filed in the District Court of the United States for the District of Kansas, Third Division, a petition that Mount Carmel Coal Company be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and that thereafter there was filed in the District Court of the United States for the District of Kansas, First Division, a petition that Mount Carmel Coal Company be adjudged a bankrupt within the true intent and meaning of the acts of

Congress relating to bankruptcy, and that thereafter the District Court of the United States for the District of Kansas, Third Division, transferred the petition filed in that Court that Mount Carmel Coal Company be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, to this court, it is ordered by the court that the petitions hereinbefore mentioned be, and the same are hereby consolidated as one proceeding.

And thereupon the petitions hereinbefore filed as hereinbefore recited that Mount Carmel Coal Company be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the petitioning creditors appearing by Karnes, New & Krauthoff and W. S. McClintock, their attorneys, and the Mount Carmel Coal Company appearing by Harkless, Crusler & Histed, its attorneys, and the demand for a jury trial filed hereinbefore having been withdrawn and the petitions having been heard and duly considered, Mount Carmel Coal Com-
9 pany is hereby declared and adjudged bankrupt accordingly

It is further ordered that this matter be referred to N. H. Loomis, who is specially named as special referee in bankruptcy of this court, to take such further proceedings therein as are required by said acts, and that said Mount Carmel Coal Company shall attend before said referee at his office in Topeka, Kansas, and henceforth shall submit to such orders as may be made by said referee or by this court relating to said bankruptcy.

Dated September 26, 1905.

JOHN C. POLLOCK, Judge.

Endorsed: Nos. 816 and 832. In Re Mount Carmel Coal Company, Bankrupt. Order of Adjudication. Filed Sep. 26, 1905. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

[10]

## IN THE DISTRICT COURT OF THE UNITED STATES,
### FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

In the Matter of
MOUNT CARMEL COAL COMPANY,
Bankrupt. } In Bankruptcy.

### SCHEDULES.

Pursuant to the direction of the Special Referee, we have prepared and herewith submit the attached schedules in the above matter, showing the names and addresses of all known creditors, the security held by them, if any, and the property of the bankrupt which has come to our knowledge.

In view of the fact that we, as Receivers, have prepared and filed, in the above estate, a report and statement, exhibiting (as fully as we are able to with the information at our command) the financial status of the bankrupt, we have not attempted to duplicate such matter in the attached schedules but refer to such report for additional information not disclosed herein.

Respectfully submitted,

J. E. HURLEY,
C. LELAND, JR.,
WALTER REEVES,
*Receivers.*

## MOUNT CARMEL COAL COMPANY.

SCHEDULE A-1

### STATEMENT OF CREDITORS HOLDING SECURITIES.

| Name of Creditor, and Address. | | Amount. |
|---|---|---|
| Alliance Realty & Securities Co., Kansas City, Mo. | | $206,500.00 |
| This Company claims to hold, as security for the above and other indebtedness of Chas. J. Devlin and his companies, the following collateral | | |
| BONDS | | |
| Crawford County Coal Co. | $150,000.00 | |
| Toluca, Marquette & Northern R. R. Co. | 130,000.00 | |
| Galena, Frontenac & Northern R. R. Co. | 30,000.00 | |
| Devlin-Miller Coal Co. | 128,000.00 | |
| Bank of Topeka, Topeka, Kas. | | 3,000.00 |
| It is understood that this Bank holds security for the above, but the nature and character of same the Receivers have been unable to ascertain | | |
| City National Bank, Kansas City, Mo. | | 165,272.06 |
| Receivers are unable to itemize the security held for the above. | | |

[11]



| Name of Creditor, and Address. | Amount. |
|---|---|
| Continental National Bank, Chicago, Ill. | $88,635.00 |

This Bank holds, as security for the above, two orders—one dated May 5th, 1905, drawn by Mt. Carmel Coal Co. on E. Wilder, Treas. A. T. & S. F. Ry., reciting $35,000.00 note of that date and directing payment of same from June voucher, accepted by E. Wilder, Treas. A. T. & S. F. Ry. Similar order for same amount, dated June 6th, 1905, to cover $35,000.00 note given that day, maturing August 19th, 1905, accepted by E. Wilder, Treas. A. T. & S. F. Ry., payable from July voucher.

Corn Exchange National Bank, Chicago, Ill. 18,000.00

This Bank holds, as security for the above and other indebtedness of Chas. J. Devlin and his companies, the following collateral

BONDS.

| | |
|---|---|
| Devlin Coal Company | $60,000.00 |
| Toluca, Marquette & Northern R. R. Co. | 236,000.00 |

STOCKS.

| | |
|---|---|
| Devlin Coal Company | 200 Shares. |
| Marceline Coal Co. | 75 " |
| Marceline Mercantile Co. | 25 " |
| Marquette Third Vein Coal Co. | 1,250 " |

Central Trust Co. of Illinois, Chicago, Ill. 44,200.00

Security as follows:

BONDS.

| | |
|---|---|
| Devlin Coal Co. | $5,000.00 |
| Marquette Third Vein Coal Co. | 10,000.00 |

STOCKS.

| | |
|---|---|
| First National Bank, of Topeka | 30 Shares. |
| First National Bank, of Toluca, Ill. | 120 " |
| Central National Bank, of Topeka | 130 " |

Central National Bank, Topeka, Kas. 143,170.00

Claims to hold, as security for the above and other indebtedness of Chas. J. Devlin and his companies, the following collateral:

BONDS.

| | |
|---|---|
| Crawford County Coal Co. | $40,000.00 |
| Devlin-Miller Coal Co. | 35,000.00 |
| Marquette Third Vein Coal Co. | 41,000.00 |
| Marquette, Spring Valley & Northwestern R. R. Co. | 7,000.00 |
| Toluca, Marquette & Northern R. R. Co. | 158,000.00 |

STOCK.

| | |
|---|---|
| Pittsburg & Midway Coal Co. | 80,000.00 |

First National Bank, Topeka, Kas. 360,420.00

This Bank claims to hold the following collateral, to secure loans and drafts amounting to $540,905.65 on notes of Chas. J. Devlin and the Mt. Carmel Coal Co.:

STOCKS.

| | |
|---|---|
| Mt. Carmel Mercantile Co. | $25,000.00 |
| First National Bank, of Toluca, Ill. | 18,000.00 |
| Central Bank Bldg. Assoc., Topeka | 6,800.00 |
| Devlin Coal Co. | 10,000.00 |
| First National Bank, Topeka | 86,500.00 |
| Merchants National Bank, Topeka | 6,600.00 |
| Marceline Mercantile Co. | 10,000.00 |
| Bank of Topeka, Topeka | 1,400.00 |
| Collinsville Mercantile Co. | 8,000.00 |
| | $172,300.00 |

| Name of Creditor, and Address. | | Amount. |
|---|---|---|
| Also, 28 insurance policies on the life of Chas. J. Devlin, on which the cash surrender value at the time of assignment was | $60,894.99 | |
| Also, deed from Chas. J. Devlin and wife to real estate in Crawford and Shawnee counties, Kansas, and La Salle, Putnam and Marshall counties, Illinois. | | |
| Also, the following stocks and bonds: | | |
| Crawford County Coal Co. | 203,000.00 | |
| Toluca, Marquette & Northern R. R. Co. | 20,000.00 | |
| Devlin-Miller Coal Co. | 98,000.00 | |
| Galena, Frontenac & Northern R. R. | 11,000.00 | |
| Marquette, Spring Valley & Northwestern R. R. Co. | 10,000.00 | |
| STOCKS. | | |
| Mt. Carmel Mercantile Co. | 4,300.00 | |
| Devlin-Miller Coal Co. | 125,000.00 | |
| Toluca, Marquette & Northern R. R. Co. | 125,000.00 | |
| First National Bank, Leavenworth, Kan. | | $10,000.00 |
| Security as follows: | | |
| BONDS. | | |
| Devlin Coal Co. | 12,000.00 | |
| STOCKS. | | |
| First National Bank, Toluca, Ill. | 50 Shares. | |
| Central National Bank Bldg., Topeka | 2 Shares. | |
| Fourth National Bank, St. Louis, Mo. | | 120,000.00 |
| This Bank holds, as security for the above and other indebtedness of Chas. J. Devlin and companies, the following collateral | | |
| BONDS. | | |
| Toluca, Marquette & Northern R. R. Co. | $10,000.00 | |
| Devlin Coal Company | 35,000.00 | |
| STOCKS. | | |
| First National Bank, of Topeka | 486 Shares. | |
| Central National Bank, Topeka | 405 Shares. | |
| First National Bank, Toluca, Ill. | 10 Shares. | |
| This Bank has also disposed of the following collateral which it held: | | |
| 420 Shares, American National Bank, Kansas City. | | |
| 150 Shares, National Bank of Commerce, Kansas City. | | |
| 500 Shares, Fourth National Bank, St. Louis, Mo. | | |
| Leavenworth National Bank, Leavenworth, Kas. | | 15,000.00 |
| Secured by order on Treasurer of Santa Fe System for same amount. | | |
| National Bank of Commerce, Kansas City, Mo. | | 83,506.00 |
| This Bank is supposed to hold security for the above, but the nature and character of same the Receivers have been unable to ascertain. | | |
| Total | | $1,257,703.00 |

SCHEDULE A 2.

## STATEMENT OF CREDITORS WHOSE CLAIMS ARE UNSECURED

| Name of Creditor, and Address. | Amount. |
|---|---|
| Adams Bros., Topeka, Kas. | $18.50 |
| A. T. & S. F. Ry. Co., Topeka, Kas. | 79,371.20 |
| American National Bank, Kansas City, Mo. | 54,502.00 |
| B.-R. Electric & Telephone Mfg. Co., Kansas City, Mo. | 170.68 |
| Beasley & Miller, Pittsburg, Kas. | 82.87 |
| Borden & Selleck Co., Kansas City, Mo. | 5.00 |
| Bowman Furniture Co., Pittsburg, Kas. | 93.00 |
| Braden, W. H., Pittsburg, Kas. | 9.00 |
| Cherokee & Pittsburg Coal & Mining Co., Topeka, Kas. | 17,714.03 |
| Chicopee Drug Co., Chicopee, Kas. | 1.00 |
| Clark, Geo. A., Topeka, Kas. | 24.00 |
| Chicopee Lumber Co., Chicopee, Kas. | 190.47 |
| Coughlin Hardware Co., Topeka, Kas. | 4,576.33 |
| Crowell, T. J., Pittsburg, Kas. | 21.05 |
| Craig, Robt., Osage City, Kas. | 52.92 |
| Robert Craig, Supt., Osage City, Kas. | 6.15 |
| Crane Co., Kansas City, Mo. | 529.78 |
| Du Pont Co., E. I., Kansas City, Mo. | 6,417.10 |
| Duncan Foundry & Machine Works, Alton, Ill. | 1,465.71 |
| Devlin, Chas. J., Topeka, Kas. | 8,786.66 |
| Crawford County Light, Heat, Water & Power Co., Frontenac, Kas. | 600.00 |
| Crawford County Coal Co., Topeka, Kas. | 6,869.40 |
| First National Bank, Toluca, Ill. | 10,620.00 |
| Fairbanks, Morse & Co. | ..... |
| City Water Works, Topeka, Kas. | ..... |
| Edison Electric Illuminating Co., Topeka, Kas. | ..... |
| Garlock Packing Co., 908 N. Second St., St. Louis, Mo. | 101.21 |
| Goodman Mfg. Co., Halstead St. and 18th Place, Chicago. | 5,803.20 |
| Great Western Mfg. Co., Leavenworth, Kas. | 109.40 |
| Hall Lithographing Co., Topeka, Kas. | 493.15 |
| Hirsch Rolling Mill Co., St. Louis, Mo. | 3,066.48 |
| Hood & Sons Implement Co., Pittsburg, Kas. | 23.65 |
| Hogeboom, D., Pittsburg, Kas. | 1.25 |
| Independent Telephone Co., Topeka, Kas. | 1.90 |
| Jones & Laughlin Steel Co., Chicago, Ill. | 1,081.69 |
| Joplin Machine Works, Joplin, Mo. | 134.50 |
| Keuffel & Esser Co., 111 Madison St., Chicago, Ill. | 11.12 |
| Kansas City Coal & Coke Co., Kansas City, Mo. | ..... |
| Kinney Secret Service Bureau, Topeka, Kas. | 930.00 |
| Kitchen, J. H., Pittsburg, Kas. | 62.50 |
| Krauss & Sons, O., 224 Kas. Ave., Topeka, Kas. | 403.00 |
| Mo. & Kas. Tele. Co., Pittsburg, Kas. (Estd.) | 369.05 |
| Mo. & Kas. Tele. Co., Topeka, Kas. | 583.90 |
| Merchants National Bank, Topeka, Kas. | 2,000.00 |
| Mt. Carmel Mercantile Co., Topeka, Kas. | 53,051.72 |
| Marceline Coal Co., Marceline, Mo. | 40,867.09 |
| McNeal & Co., Joplin, Mo. | 127.52 |
| McGraw & Co., M., Newton, Kas. | 297.64 |
| New Amsterdam Casualty Co., Chicago, Ill. | 1,111.94 |
| Pittsburg Light & Power Co., Pittsburg, Kas. | 23.05 |
| Pittsburg Hardware Co., Pittsburg, Kas. | 9.85 |
| Pittsburg Hydraulic Stone Co., Pittsburg, Kas. | 36.00 |
| Pittsburg Lumber Co., Pittsburg, Kas. | 56.75 |
| Pittsburg Sewer Pipe & Conduit Co., Pittsburg, Kas. | 24.33 |
| Pittsburg Vitrified Paving & Building Brick Co., Pittsburg, Kas. | 14.30 |
| Reliance Machine & Tool Works, St. Louis, Mo. | 229.70 |
| Southwestern Fuel Co., Topeka, Kas. | ..... |

[14]



| Name of Creditor, and Address. | Amount. |
|---|---|
| Standard Oil Co., Kansas City, Mo | $4,006.00 |
| Sparks Bros., 17th and Genessee, Kansas City, Mo | 7,160.00 |
| Scott, Dr. M. K., Frontenac, Kas | 185.00 |
| Southwestern Interstate Coal Operators Assoc., 218 Gibraltar Bldg., Kansas City | 112.32 |
| Sulphur Springs Lumber & Tie Co., Sulphur Springs, Ark | 1,187.51 |
| Toluca Lumber & Hardware Co., Toluca, Ill | 1,676.43 |
| Thiesing, J. H., Pittsburg, Kas | 9.00 |
| Union Lime & Cement Co., Pittsburg, Kas | 51.20 |
| United Iron Works Co., Pittsburg, Kas | 501.04 |
| Wells Fargo & Co., Express, Topeka, Kas | 9.53 |
| Western Union Telegraph Co., Topeka, Kas | 33.13 |
| Total | $318,473.91 |

## SCHEDULE B-2—PERSONAL PROPERTY.

This Company owns no real estate or coal deposits, but is simply an operating company, which has for 8 years past worked under contracts and leases with The Atchison, Topeka & Santa Fe Ry. Co. and said Ry. Co.'s affiliated Coal Companies—the Cherokee & Pittsburg Coal & Mining Co. and The Osage Carbon Co. Operations are still carried on under the agreements referred to in extracting coal from lands owned by the last named coal companies, and from coal deposits owned jointly by the said Cherokee Company and Crawford County Coal Company. Coal is also being mined through Shaft No. 9 from lands owned by Devlin-Miller Coal Company.

Said agreements permitted Mount Carmel Coal Company to use the mining facilities and equipment owned by the Cherokee and Osage companies in connection with the then existing shafts, likewise the use in new shafts of parts removed from shafts dismantled; and provided that all new shafts in other respects should be opened and equipped at the expense of Mount Carmel Company.

SCHEDULE B-2—PERSONAL PROPERTY.

**INVENTORY OF SHAFTS, APPURTENANT STRUCTURES AND MACHINERY, JULY 7, 1905.**

MINE NO. 5, CHICOPEE.

| | | Value. |
|---|---|---|
| 1 | Double Hoisting Engine, direct connected, cylinder 22 in. by 36 in., drum 8 ft. diameter, with stone foundation 24 ft. by 24 ft. by 12 ft. | $5,000.00 |
| 4 | Steam Boilers, installed, at $650 each | 2,600.00 |
| 1 | Boiler House | 1,000.00 |
| 1 | Locomotive Boiler | 400.00 |
| 1 | Upright Boiler | 125.00 |
| 1 | Hoisting Engine House | 1,000.00 |
| | Fan House, Fan, Engine and Foundation | 800.00 |
| | Deep Well | 1,000.00 |
| 1 | Pump | 125.00 |
| 400 | Feet 5¼-in. Casing | 255.00 |
| 300 | Feet 4¼-in. Casing | 180.00 |
| 1 | Working Barrel (brass) | 37.50 |
| 1 | Hooker Pump No. 10 | 250.00 |
| 2 | Hooker Pumps No. 6, at $150 | 300.00 |
| 1 | Wells Pump No. 6 | 150.00 |
| 1 | Boiler Shell Oil Tank | 50.00 |
| 2 | Tipple Scales | 125.00 |
| 4 | R.-R. Track Scales, 50 ft., Installed | 3,540.00 |
| 2 | Cages | 300.00 |
| 2 | Hoisting Cables and Sockets | 225.00 |
| 2 | Sheave Wheels | 125.00 |
| 3 | Injectors | 75.00 |
| 1 | Reservoir for Water Supply | 400.00 |
| 1 | Steam Shovel Engine | 350.00 |
| | Tower, Tipple and Connecting Trestle, complete | 7,600.00 |
| 3 | Shaker Screens, "Diamond" Bars | 2,730.00 |
| 1 | Shaker Engine | 300.00 |
| | Blacksmith Shop, "Building" | 400.00 |
| | Blacksmith Shop, Equipment | 600.00 |
| | Powder House | 75.00 |
| | Powder Magazine, "stone" | 800.00 |
| | Hose | 80.00 |
| 2 | Wind Mills | 250.00 |
| 1 | Oil Filter | 27.00 |
| | 1150 ft. 1-in., 750 ft. 2-in., 750 ft. 3-in., 1600 ft. 4-in., 90 ft. 5-in. Pipe | 839.40 |
| 1 | Oil House | 35.00 |
| 1 | Water Tank | 30.00 |
| 1 | Store House | 75.00 |
| 1 | Stable | 40.00 |
| | Dynamo Room | 300.00 |
| | Generator, Engine, Switchboard, Motor and Installation | 6,000.00 |
| | Shaft 24 ft. by 9 ft. by 80 ft., Timbered with 6-in. by 8-in. | 1,200.00 |
| | Air Shaft 18 ft. by 8 ft. by 80 ft., Timbered with 6-in. by 8-in. | 960.00 |
| | Sinking of Main Shaft | 2,000.00 |
| | Sinking of Air Shaft | 1,500.00 |
| | Shaft Bottom and Parting on each side thereof | 2,000.00 |
| | No. 5½ Development Shaft | 1,000.00 |

| IN MINE. | Value. |
|---|---|
| 1 Blacksmith Shop | 150.00 |
| 3 Stables | 750.00 |
| 350 ft. 1-in., 160 ft. 3-in., 3750 ft. 2-in. Piping | 427.70 |
| Total | $48,581.60 |

MINE NO. 6, FRONTENAC.

| | |
|---|---|
| 1 Double Hoisting Engine, direct connected, cylinders 14 in. by 18 in., drum 4 ft. diameter, with stone foundation 16 ft. by 20 ft. by 10 ft. | $3,000.00 |
| 1 Double Hoisting Engine House | 550.00 |
| 4 Steam Boilers, installed, at $650 each | 2,600.00 |
| 1 Boiler House | 800.00 |
| 1 Fan House, Fan, Engine and Foundation | 800.00 |
| 1 Hooker Pump No. 6 | 150.00 |
| 1 Hooker Pump No. 12 | 400.00 |
| 1 Duplex Pump | 125.00 |
| 1 Boiler Shell Oil Tank | 50.00 |
| 2 Tipple Scales | 125.00 |
| 4 R. R. Track Scales | 3,540.00 |
| 2 Cages, Self Dump | 450.00 |
| 2 Hoisting Cables and Sockets | 170.00 |
| 2 Sheave Wheels | 110.00 |
| 2 Injectors | 50.00 |
| Tower, Tipples, Trestle and Piers | 3,600.00 |
| 1 Shaker Screen | 500.00 |
| 1 Shaker Engine | 300.00 |
| 1 Blacksmith Shop, Building | 350.00 |
| Blacksmith Shop, Equipment | 600.00 |
| 1 Powder House | 75.00 |
| 1 Powder Magazine, stone | 800.00 |
| 400 ft. 1½-in., 250 ft. 3-in., 360 ft. 2-in., 75 ft. 5-in., 60 ft. 6-in. Pipe, | 196.25 |
| 1 Oil Filter | 27.50 |
| Dynamo Room | 300.00 |
| Generator, Engine, Switchboard, Motor and Installation | 6,000.00 |
| 1 Norwalk Compressor | 3,600.00 |
| 1 Wind Mill | 175.00 |
| Shaft 8 ft. by 18 ft. by 90 ft., Timbered with 6-in. by 8-in | 1,100.00 |
| Air Shaft 7 ft. by 16 ft. by 90 ft., Timbered with 6-in by 8-in | 800.00 |
| Sinking of Main Shaft | 1,080.00 |
| Sinking of Air Shaft | 1,000.00 |
| Shaft Bottom and Parting each side thereof | 2,000.00 |
| 1 Oil House | 50.00 |
| 1 Store House | 40.00 |
| 1 Store House | 35.00 |
| 1 Sand House | 30.00 |

| IN MINE. | |
|---|---|
| 4 Stables | 750.00 |
| Blacksmith Shop | 150.00 |
| 250 ft. 1½-in., 3.000 ft. 2-in., 520 ft. 3-in., 600 ft. 4-in. Pipe | 617.90 |
| Total | $37,096.65 |

MINE NO. 8, CHICOPEE.

| | |
|---|---|
| 1 Double Hoisting Engine, direct connected, cylinders, 14 in. by 18 in., drum 4 ft. diameter, with stone foundation 16 ft. by 20 ft. by 10 ft. | $3,000.00 |
| 1 Double Hoisting Engine House | 550.00 |
| 3 Steam Boilers, installed, at $650 | 1,950.00 |
| 1 Steam Boiler House | 1,000.00 |

| | Value. |
|---|---|
| Fan House, Fan, Engine and Foundation | 800.00 |
| 1 Deep Well | 1,000.00 |
| 1 Pump | 125.00 |
| 400 ft. 5¼-in. Casing | 255.00 |
| 300 ft. 4¼-in. Casing | 180.00 |
| 1 Working Barrel (brass) | 37.50 |
| 2 Hooker Pumps No. 6 | 300.00 |
| 1 Duplex Pump 6x4x6 | 150.00 |
| 1 Boiler Shell Oil Tank | 50.00 |
| 2 Tipple Scales | 125.00 |
| 4 R. R. Track Scales, 50-ft., installed | 3,540.00 |
| 3 Cages, Self Dump | 675.00 |
| 2 Hoisting Cables and Sockets | 170.00 |
| 2 Sheave Wheels | 110.00 |
| 2 Injectors | 50.00 |
| 2 Reservoirs for Water Supply | 300.00 |
| Tower, Tipple, Trestles and Piers | 3,500.00 |
| 1 Shaker Screen | 500.00 |
| 1 Shaker Engine | 300.00 |
| Blacksmith Shop, "Building" | 300.00 |
| Blacksmith Shop, Equipment | 400.00 |
| 1 Powder House | 75.00 |
| 1 Powder Magazine, "Stone" | 800.00 |
| Hose | 60.00 |
| 500 ft. 1-in., 450 ft. 1½-in., 550 ft. 2-in., 1,500 ft. 2½-in., 500 ft. 4-in. Pipe | 506.50 |
| Shaft, 8 ft. by 18 ft. by 90 ft., Timbered with 6-in. by 8-in | 1,080.00 |
| Air Shaft, 7 ft. by 16 ft. by 90 ft., timbered with 6-in. by 8-in | 810.00 |
| Sinking Main Shaft | 1,080.00 |
| Sinking Air Shaft | 1,000.00 |
| Shaft Bottom and Parting each side thereof | 2,000.00 |
| IN MINE. | |
| 4 Stables | 750.00 |
| 500 ft. 3-in., 150 ft. 2-in. Pipe | 125.00 |
| Total | $27,654.00 |

MINE NO. 9, FRONTENAC.

| | |
|---|---|
| 1 Double Hoisting Engine, direct connected, cylinders 14-in. by 18-in., drum 4 ft. diameter, with stone foundation 16 ft. by 20 ft. by 10 ft. | $3,000.00 |
| 1 Double Hoisting Engine House | 550.00 |
| 2 Boilers, installed, at $650 | 1,300.00 |
| 1 Boiler House | 1,000.00 |
| 1 Mounted Boiler and Engine | 600.00 |
| Fan House, Fan, Engine and Foundation | 800.00 |
| 3 Duplex Pumps | 375.00 |
| 2 Tipple Scales | 125.00 |
| 4 R. R. Track Scales | 3,540.00 |
| 2 Cages, Self Dump | 450.00 |
| 2 Hoisting Cables and Sockets | 170.00 |
| 2 Sheave Wheels | 110.00 |
| 2 Injectors | 50.00 |
| 1 Reservoir for Water Supply | 200.00 |
| Tower, Tipple, Trestles and Piers | 2,920.00 |
| 1 Shaker Screen | 500.00 |
| 1 Shaker Engine | 300.00 |
| 1 Blacksmith Shop, "Building" | 300.00 |
| Blacksmith Shop "Equipment" | 400.00 |

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| | Value. |
|---|---|
| 1 Pipe Cutting Machine and Threader | 200.00 |
| 1 Powder House | 50.00 |
| 1 Powder Magazine, stone | 800.00 |
| Hose | 55.00 |
| 350 ft. 1½-in., 1900 ft. 2½-in., 100 ft. 5-in., 600 ft. 2-in. Pipe | 340.50 |
| Shaft 8 ft. by 18 ft. by 90 ft., Timbered with 6-in. by 8-in. | 1,050.00 |
| Air Shaft 7 ft. by 16 ft. by 90 ft., Timbered with 6-in. by 8-in. | 820.00 |
| Sinking of Shaft | 1,080.00 |
| Sinking of Air Shaft | 1,000.00 |
| Shaft Bottom and Parting each side thereof | 2,000.00 |
| IN MINE. | |
| 3 Stables | 300.00 |
| 300 ft. 2½-in., 100 ft. 2-in. Pipe | 58.00 |
| Total | $24,443.50 |

SHAFT NO. 10, FRONTENAC.

| | |
|---|---|
| Sinking two Shafts, 6 ft. by 12 ft. by 60 ft. | $1,200.00 |
| Timbering two Shafts | 250.00 |
| 1 Gin Hoist | 100.00 |
| 1 2 Horse Hoist | 100.00 |
| Total | $1,650.00 |

TELEPHONE SYSTEM.

| | |
|---|---|
| Private Telephone System connecting Frontenac office with the several mines | $300.00 |

IN OSAGE COUNTY.

| | |
|---|---|
| 1 Drilling Machine | $5.00 |
| 3 Thread Bars | 5.45 |
| 6 Machine Boxings | 4.68 |
| 1 Hoisting Cable | 28.00 |
| 1 Hoisting Cable Socket | 2.50 |
| 1 Hatchet | .60 |
| 1 Wrench | .85 |
| 2 8-in Blocks and Rope | 10.00 |
| | $57.08 |

RECAPITULATION.

| | |
|---|---|
| Mine No. 5, Chicopee | $48,581.60 |
| Mine No. 6, Frontenac | 37,096.65 |
| Mine No. 8, Chicopee | 27,654.00 |
| Mine No. 9, Frontenac | 24,443.50 |
| Shaft 10, Frontenac | 1,650.00 |
| Telephone System to Mines | 300.00 |
| Osage County Mines | 57.08 |
| | $139,782.83 |

SCHEDULE B-2—PERSONAL PROPERTY.

**INVENTORY OF SUNDRY ITEMS OF MINE EQUIPMENT JULY 7, 1905.**

MINE NO 5, CHICOPEE.

| | | Value. | |
|---|---|---|---|
| 1 | Wagon | $60.00 | |
| 1 | Set Double Harness | 25.00 | |
| 1 | Cart and Harness | 65.00 | |
| | Mine Props, at pit head | 350.00 | |
| 450 | Pit Cars, in mine, at $22.50 each | 10,125.00 | |
| 55 | Sets Mule Harness, in mine, at $5.00 each | 275.00 | |
| 5 | Water Cars, in mine, at $30.00 each | 150.00 | |
| 2 | Oil Cars, in mine, at $25.00 each | 50.00 | |
| | Rails in tracks, in mine | 15,063.00 | |
| | Switches laid, in mine | 2,175.00 | |
| | Ties in tracks, in mine | 6,606.37 | |
| | | | $34,944.37 |

MINE NO. 6, FRONTENAC.

| | | | |
|---|---|---|---|
| 1 | Wagon | $60.00 | |
| 2 | Sets Harness | 25.00 | |
| 1 | Cart and Harness | 65.00 | |
| | Mine Props, at pit head | 280.00 | |
| 500 | Pit Cars, in mine, at $22.50 each | 11,250.00 | |
| 35 | Sets Mule Harness, in mine, at $5.00 each | 175.00 | |
| 4 | Water Cars, in mine, at $30.00 each | 120.00 | |
| 1 | Oil Tank Car, in mine | 25.00 | |
| | Rails in tracks, in mine | 9,650.50 | |
| | Switches laid, in mine | 1,330.00 | |
| | Ties in tracks, in mine | 3,985.80 | |
| | | | 26,966.30 |

MINE NO 8, CHICOPEE.

| | | | |
|---|---|---|---|
| 1 | Wagon | $60.00 | |
| 1 | Set Harness, double | 25.00 | |
| 1 | Cart and Harness | 65.00 | |
| | Mine Props, at pit head | 220.00 | |
| 390 | Pit Cars, in mine, at $22.50 each | 8,775.00 | |
| 50 | Sets Mule Harness, in mine, at $5.00 each | 250.00 | |
| 2 | Water Cars, in mine, at $30.00 each | 60.00 | |
| | Rails in tracks, in mine | 14,581.52 | |
| | Switches laid, in mine | 2,420.00 | |
| | Ties in tracks, in mine | 6,395.50 | |
| | | | 32,852.02 |

MINE NO. 9, FRONTENAC.

| | | | |
|---|---|---|---|
| 1 | Wagon | $60.00 | |
| 1 | Set Harness, double | 25.00 | |
| 1 | Cart and Harness | 60.00 | |
| | Mine Props, at pit head | 285.00 | |
| 200 | Pit Cars, in mine, at $22.50 each | 4,500.00 | |
| 23 | Sets Mule Harness, in mine, at $5.00 each | 115.00 | |
| 2 | Water Cars, in mine at $30.00 each | 60.00 | |
| | Rails in tracks, in mine | 7,467.00 | |
| | Switches laid, in mine | 1,400.00 | |
| | Ties in tracks, in mine | 3,145.45 | |
| | | | 17,117.45 |

| IN OSAGE COUNTY. | Value. |
|---|---|
| 5 Sets Mule Harness, at $4.00 each | $20.00 |
| | $111,900.14 |
| 2 Oil Tank (R. R.) Cars Nos. 1 and 2 | 2,000.00 |
| | $113,900.14 |

SCHEDULE B-2—PERSONAL PROPERTY.

**INVENTORY OF LIVE STOCK EQUIPMENT JULY 7, 1905.**

AT FRONTENAC AND CHICOPEE.

| | Value. | |
|---|---|---|
| Mine No. 5, No. of Mules in Mine, 54 | $5,400 | |
| Mine No. 6, No. of Mules in Mine, 31 | 3,100 | |
| Mine No. 8, No. of Mules in Mine, 45 | 4,500 | |
| Mine No. 9, No. of Mules in Mine, 21 | 2,100 | |
| 151 | | $15,100 |
| Shaft No. 5, Wagon Team, 2 Mules | $200 | |
| Shaft No. 5, Cart Mule, 1 Mule | 100 | |
| Shaft No. 6, Cart Mule, 1 Mule | 100 | |
| Shaft No. 6, Wagon Team, 2 Horses | 250 | |
| Shaft No. 8, Wagon Team, 2 Mules | 200 | |
| Shaft No. 9, Wagon Team, 2 Mules | 200 | |
| Shaft No. 9, Cart Mule, 1 Mule | 100 | |
| | | 1,150 |
| In Barn Yard, 1 Old Horse | $45 | |
| In Barn Yard, 5 Crippled Mules | 200 | |
| | | 245 |
| | | $16,495 |

AT OSAGE.

| | | |
|---|---|---|
| 6 Blind Horses | $270 | |
| 5 Small Mine Mules | 300 | |
| | | 570 |
| Total | | $17,065 |

SCHEDULE B-2—PERSONAL PROPERTY.

**RECAPITULATION OF SUPPLIES ON HAND JULY 7, 1905.**

| | |
|---|---|
| At Frontenac and Chicopee | $15,023.17 |
| In Osage County | 2,468.87 |
| Stationery in Offices at Frontenac, Chicopee and Topeka, not listed (estimated) | 100.00 |
| Total | $17,592.04 |

SCHEDULE B-2—PERSONAL PROPERTY.

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**SCHEDULE OF ACCOUNTS RECEIVABLE AT JULY 7, 1905.**

OWING BY OTHER "DEVLIN" COS.

| Debtor. | Amount. |
|---|---|
| Devlin-Miller Coal Co. | $31,980.24 |
| Kansas City Coal & Coke Co. | 25,567.41 |
| Toluca, Marquette & Northern R. R. Co. | 7.35 |
| Toluca Mercantile Co. | 12,343.68 |
| Total. | $69,898.68 |

OWING BY OUTSIDE PARTIES.

| Debtor. | Amount. |
|---|---|
| Butterly, J. P. | $1,304.20 |
| Hutchinson Kansas Salt Co. | 1,789.77 |
| Jackson-Walker Coal & Material Co. | 1,329.55 |
| Kansas City Belt Line. | 2,499.69 |
| Southwestern Fuel Co. | 32,776.30 |
| Total. | $39,699.51 |

SCHEDULE B-2—PERSONAL PROPERTY.

**MEMO. OF UNCONSIGNED COAL ON HAND JULY 7, 1905.**

AT CHICOPEE.

| | | | |
|---|---|---|---|
| Mine No. 5, 31 Cars, containing | 751.35 tons "Mill," at 60c., | $450.81 | |
| In Boiler Room | 10.00 tons "Mill," at 60c., | 6.00 | |
| Mine No. 8, 43 Cars, containing | 1,051.40 tons "Mill," at 60c., | 630.84 | |
| In Boiler Room | 9.00 tons "Mill," at 60c., | 5.40 | |
| | 1,821.75 | | $1,093.05 |

AT FRONTENAC.

| | | | |
|---|---|---|---|
| Mine No. 6, 4 Cars, containing | 91.10 tons "Nut," at $1.00, | $91.10 | |
| 7 Cars, containing | 165.55 tons "Mill," at 60c., | 99.33 | |
| In Boiler Room | 10.50 tons "Mill," at 60c., | 6.30 | |
| Mine No. 9, 27 Cars, containing | 671.90 tons "Mill," at 60c., | 403.14 | |
| In Boiler Room | 11.00 tons "Mill," at 60c., | 6.60 | |
| | 950.05 | | 606.47 |

AT BURLINGAME AND OSAGE

Nil.

Total. $1,699.52

#816. In re Mount Carmel Coal Co. Bankrupt. Schedules Filed Oct. 19, 1905 Morton Albaugh, Clerk.

Bond of Trustees.

22 In the District Court of the United States for the District of Kansas. First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Know all men by these presents: That we, James E. Hurley, Cyrus Leland, Jr., and Walter Reeves, as principals, and the Federal Union Surety Company, a corporation, of Indianapolis, Indiana, as surety, are held and firmly bound unto the United States of America in the sum of Fifty Thousand Dollars ($50.000.00), in lawful money of the United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this 30th day of Dec. A. D. 1905.

The condition of this obligation is such, that whereas the above named James E. Hurley, Cyrus Leland, Jr., and Walter Reeves were, on the 19th day of December. A. D. 1905, appointed trustees in the case pending in bankruptcy in said court, wherein the estate of the Mount Carmel Coal Company is the bankrupt, and they, the said James E. Hurley, Cyrus Leland Jr. and Walter Reeves have accepted said trust with all the duties and obligations pertaining thereto:

Now, therefore, if the said James E. Hurley, Cyrus Leland Jr. and Walter Reeves, trustees as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said bankrupt which shall come into their hands and possession, and shall in all respects faithfully perform all their official duties as said trustees,
23 then this obligation to be void; otherwise to remain, in full force and virtue

J. E. HURLEY,
C. LELAND, Jr.,
WALTER REEVES.
FEDERAL UNION SURETY COMPANY.
Seal
F. U. S. Co.
By R. W. Blair
Resident Vice-President.
Attest: I. L. BETZER,
Resident Assistant Sec'y.

Signed and sealed in presence of
E. M. Griggs, Witness to signature of Walter Reeves.
E. M. Griggs, Witness of J. E. Hurley,
Witness to signature, W. B. Collinson.

At a Court of Bankruptcy held in and for the Dis-
24 trict of Kansas, First Division, at Topeka, this first day of January, 1906.

Before N. H. Loomis Special Referee in Bankruptcy.

In the District Court of the United States for the District of Kansas, First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt. In Bankruptcy.

It appearing to the Court that the above named The Mount Carmel Coal Company was adjudicated a bankrupt by this court on the 26th day of September, 1905, on a petition filed on the 17th day of July, 1905; that J. E. Hurley, Cyrus Leland Jr. and Walter Reeves were duly appointed trustees of the estate of the said bankrupt at an adjourned session of the first creditors' meeting of said estate, held upon the 19th day of December, 1905; that they were duly notified of their appointment as such trustees and signified their acceptance of said appointment; and it further appearing that the time within which they were required to give bond as trustees was extended five days beyond the original ten days fixed by law for the giving of bond, and that within the time so fixed the said Trustees furnished a bond with sureties for the faithful performance of their official duties, in the amount fixed by the order of the court, to-wit, in the sum of fifty thousand dollars ($50,000), it is ordered that the said bond be and the same is hereby approved.

N. H. LOOMIS,
Special Referee in Bankruptcy.

Endorsed: No. 816. In the matter of the Mount Carmel Coal Company, Bankrupt. Bond of Trustees and Approval of Referee. Approved and filed Jan'y 1, 1906, N. H. Loomis, Referee. Filed Jan. 3, 1906. Morton Albaugh, Clerk, By F. L. Campbell, Deputy Clerk.

In the District Court of the United States for the Dis-
25 trict of Kansas. First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt. In Bankruptcy.

On petition of The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal & Mining Company.

I, N. H. Loomis, Special Referee of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, The Atchison, Topeka & Santa Fe Railway Company, the Osage Carbon Company, and The Cher-

okee & Pittsburg Coal & Mining Company presented a petition whereby they prayed for an order upon the Receivers requiring them to deliver to The Atchison, Topeka & Santa Fe Railway Company a certain amount of coal to carry out the provisions of a certain contract, or authorize the said petitioners to cancel said contract and to take possession of the property referred to therein, and that the relief prayed for in said petition was after full consideration denied.

The precise questions involved in said petition, as well as the findings and conclusions of the Referee, are set forth in the opinion of the Referee attached to the application of the petitioners for a review.

The application for a review has been allowed by the Referee, and the questions involved are hereby certified to the Judge for his opinion thereon.

In order that the Judge may have a full and complete understanding of the points involved, the Referee includes
26 in the record certified to the Judge the following:

1. Petition for review of the Atchison, Topeka & Santa Fe Railway Company, et al, to which is attached an amendment to the original petition.

2. Opinion of the Referee.

3. Brief on intervening petition and proceedings of the Atchison, Topeka & Santa Fe Ry.

4. Petition of The Atchison, Topeka & Santa Fe Ry. Co. et al, to which is attached a notice to the Receivers.

5. Stipulation filed December 15, 1905.

6. Demurrer of the Receivers.

7. Answer of the Trustees.

8. Amended answer of the Trustees.

9. Transcript of evidence.

10. Stipulation with respect to affidavit of W. H. Rossington.

11. Affidavit of W. H. Rossington.

12. Objections filed by the Trustees to the affidavit of W. H. Rossington.

13. Points and authorities on behalf of the Trustees.

14. Order of Referee denying relief prayed for.

N. H. LOOMIS,
Special Referee.

Dated February 10, 1906.

27 In the District Court of the United States for the District of Kansas, First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Petitition of the Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal and Mining Company.

Amendment to Petition.

The petitioner, The Atchinson, Topeka & Santa Fe Railway Company respectfully shows herein that since the filing of its above entitled petition, the said J. E. Hurley, Cyrus Leland and Walter Reeves have been appointed trustees in bankruptcy by the creditors of said Mount Carmel Coal Company, and have ceased to be receivers.

Wherefore, the petitioner prays that it may have the same relief against said trustees that it prayed for against the said parties as receivers; that this amendment is made by agreement with counsel representing said trustees and receivers.

WM. R. SMITH
O. J. WOOD.
Attorneys for Petitioner, The Atchison, Topeka & Santa Fe Railroad Company.
ROBT. DUNLAP,
Of Counsel.

28 In the District Court of the United States for the District of Kansas, First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

On petition of The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and the Cherokee & Pittsburg Coal and Mining Company.

To Hon. N. H. Loomis, Referee in Bankruptcy:

Your petitioner, The Atchison, Topeka & Santa Fe Railway Company, respectfully show that on the 27th day of January, 1906, an order in the above entitled matter was made by said referee, a copy of which is hereto annexed, together with brief of petitioners, that such order was and is erroneous in this, to-wit:

First. That the said Referee erred in holding that under the evidence the petitioner the said Railroad Company, was not entitled to have delivered to it by the receivers and trustees in bankruptcy of said Mount Carmel Coal Company coal to the amount of $57,304.16, on account of the agreement made before said receivership between the Mount Carmel Coal Company and the said Atchison, Topeka & Santa Fe Railway Company.

Second. That the Referee erred in holding that The Atchison, Topeka & Santa Fe Railway Company did not have an equitable right under the agreement made with it by the said Mount Carmel Coal Company to have an order made by him for the delivery by the Receivers and Trustees to said
29 Railway Company of Coal to the amount of $57,304.16 for moneys in that amount advanced to said Mount Carmel Coal Company by said Railway Company, which said coal was agreed to be furnished to satisfy said advances by the said Mount Carmel Coal Company before its adjudication in bankruptcy.

Third: That the referee erred in holding that there was no testimony indicating an intention to modify the written lease to the extent that the advances made by the Railway Company to the Mount Carmel Coal Company were to be paid by the latter in coal.

Fourth: That the referee erred in holding that said verbal agreement between the Atchison, Topeka & Santa Fe Railway Company and the Mount Carmel Coal Company was a separate and independent agreement from the contract and lease set out in the petition herein.

Fifth. That the referee erred in denying the relief prayed for by the petitioners herein, which was that the said amount of money so advanced by the said Atchison, Topeka & Santa Fe Railway Company be paid to it in full by the delivery of coal by said receivers and trustees, or that the receivers and trustees be ordered and directed to deliver over the possession of all lands and properties described in said written contracts set forth in the petition.

5 1-2. That the referee erred in holding that the written lease under which the receivers and trustees took possession of the coal mines operated by the Mount Carmel Coal Company before the receivership, was not charged with the payment of the amounts advanced by the petitioner to the Mount Carmel Coal Company to satisfy its pay rolls and to
30 keep the mines described in said lease in a running condition.

Sixth. That the said referee erred in denying to the petition the general relief prayed for in its petition.

WM. R. SMITH,
O. J. WOOD,
Attorneys for petitioner,
The Atchison, Topeka & Santa Fe Railway Company.

ROBERT DUNLAP,
Of Counsel.

State of Kansas,
County of Shawnee.—ss.

I, Edward L. Copeland, being duly sworn on oath, state that I am the Secretary and Treasurer of the Atchison, Topeka & Santa Fe Railway Company, a corporation, the petitioner herein, and do make solemn oath that the statements of fact contained in the above and foregoing are true, according to the best of my knowledge, information and belief.

E. L. COPELAND.

Subscribed to and sworn to before me this 5th day of February, 1905.

GEO. W. PORTER,
Notary Public.

Seal N. P. My commission expires January 21, 1907.

In the District of the United States for the District of
31 Kansas First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Opinion of the Referee on petition of The Atchison, Topeka & Santa Fe Railway Company, The Osago Carbon Company, and The Cherokee & Pittsburg Coal and Mining Company.

The petitioners entered into a contract with Charles J. Devlin on or about the first day of October, 1896, whereby they leased to him a certain coal and mineral rights in Osage and Crawford Counties, Kansas, for a term of three years. The lease provides for the payment of certain royalties by Mr. Devlin for coal taken from the leased premises, and also makes provision for the furnishing of certain amounts of coal to The Atchison, Topeka and Santa Fe Railway Company (hereinafter called the Santa Fe Company), one of the lessors, at prices specified in the lease. On the first day of March 1897, this lease, by and with the consent of the petitioners, was duly assigned by Charles J. Devlin to The Mount Carmel Coal Company.

The said lease was modified and its terms extended by subsequent agreements until June 1, 1906. The extension agreements required the Mount Carmel Coal Company to give a bond in the sum of $100,000.00, conditioned for the faithful performance of the terms of the contract.

In the conduct of its business it became necessary for The Mount Carmel Coal Company to borrow money from time to time, with which to meet its pay rolls. At times the credit of The Mount Carmel Coal Company became exhausted and it was unable to borrow money from the banks without first taking up obligations held by them. Upon such occasions
32 the Coal Company, through its President, Charles J. Devlin, would make application to the Santa Fe Company for assistance in the way of procuring funds with which to meet its pay rolls.

The manner in which this was done is well summarized in the testimony of Mr. Wellman, Assistant Treasurer of the Santa Fe Company on re-cross examination. It reads as follows:

"Q. Now to summarize the statement you have made to Judge Smith, I understand you that Mr. Devlin, on instances, had borrowed from banks a certain amount of money, possibly to meet his pay roll, and then when that note became due, and his next pay roll might be maintained, he was not able to raise the money by further loans from those banks until he had paid for the notes he had negotiated at these banks, and that your company advanced the money to those banks and took up the notes, and then they let Devlin have the additional money. That is the fact, is it? A. Yes."

The testimony also shows that these advances made by the Santa Fe Company to enable the Mount Carmel Coal Company to meet its pay rolls, were to be paid by the delivery of coal under the terms of the lease above referred to.

Article XXII of the lease covers the sale and delivery of coal to the Santa Fe Company, and reads as follows;

"Article XXII."

"Said C. J. Devlin shall sell and deliver to the Railway Company, on its cars at the mines (except in case of accidents, strikes or causes beyond his control) and the Railway Company shall purchase, in such quantities as are required daily, all the coal required by it in the operation of the lines of railway in Kansas, as far west as and including Newton, which it

may own, control, or operate, and such portion of its
33 supply from Kinsley to Newton, including Kinsley and tributary branches, as it may from time to time elect, Provided, that the supply for Atchison, and Leavenworth, may be bought from other parties than said C. J. Devlin, at the election of the Railway Company, and Provided, Further, that the coal supply herein contracted for may be increased to an amount not over 50,000 tons per year for use on lines other than those described in this article, if owned, leased, controlled or operated by the Railway Company. All coal so taken by the Railway Company shall be upon the following terms and conditions:

"1. That lump coal so furnished shall be screened lump coal, as free from slack, slate and other impurities, as the nature of the coal will permit, by the use of the usual appliances for screening and preparation.

"2. That the Railway Company shall have the right to inspect the coal at the mines and may reject any which is not screened and prepared as above specified.

"3. That the Railway Company shall pay to said C. J. Devlin on or before the 15th day of each month, for all coal so delivered during the preceding calendar month, per ton of 2,000 pounds, track scale weights at the mine, as follows:

(a.) One dollar and forty-nine cents ($1.49) per ton, mine run coal in the Osage District.

(b.) One dollar and fourteen cents ($1.14) per ton screened lump in the Cherokee District.

(c.) Eighty-nine cents ($0.89) per ton mine run coal in the Cherokee District.

(d.) Twenty cents ($0.20) per ton, slack coal, in
34 the Cherokee District.

(e.) One dollar and six cents ($1.06) per ton for lump and nut coal mixed, in the Cherokee District.

"4. That the Railway Company shall have the right at all reasonable times, to examine the track scales and to inspect the books and papers pertaining to the weighing of the coal.

"5. That in the event of accident or strike at the Cherokee & Pittsburg Coal & Mining Co.'s mines, which prevents said C. J. Devlin supplying coal from that mine, or if the Railway Company shall elect to take all or any part of its coal supply from other mines controlled by said C. J. Devlin, then the railway company shall itself pay the trackage or switching charge on such coal.

"6. That if C. J. Devlin is obliged to pay an advance in the prices now paid to miners for mining coal, which are.

| | | | |
|---|---|---|---|
| Osage City, | yearly, | $1.25 | per ton. |
| Peterton, | " | 1.21 | " |
| Scranton, | " | 1.03 | " |
| Frontenac, | summer, | 0.87-1-2 | " |
| " | winter, | 0.95 | " |

then the price to be paid by the Railway Company shall be increased to the extent of such advance in mining prices, and in the event of a reduction in the mining prices, the price to be paid by the Railway Company shall be reduced to the extent of such reduction in mining price, Provided, that if coal shall be mined at any mine or place other than those above mentioned, then said coal shall, within the meaning of this article, be treated in precisely the same manner as if mined at that mine or place above mentioned, to which it is nearest in location.

"7. That in case the Railway Company shall elect
35 within one year after October 1, 1896, to take its supply of coal for any other portion of its lines during the balance of the term hereof from the mines hereby leased, said C. J. Devlin shall furnish such coal at the same price as hereinbefore provided, upon receiving at least ninety (90) days notice of the approximate quantity of coal required daily."

It is claimed by petitioners that at the time the arrangements were made by the Santa Fe Company to advance money to enable the Mount Carmel Coal Company to meet its pay rolls as aforesaid, that the terms of the written contract between the parties were modified by the oral agreement with respect to advancing money and receiving pay therefor in coal to be furnished by the Coal Company, and that the agreement with respect thereto became a part of the original contract and subject to all of its terms.

Under the terms of the written lease the contract may be declared forfeited by either party for failure to comply with its terms. The forfeiture clauses read as follows:

"Article XVII.

36 "This lease and agreement shall continue for three (3) years from date hereof, but may be terminated by and at the option of the three parties hereto as follows:

"(a) By the Coal Companies, or the Railway Company, for a failure by said C. J. Devlin to perform any of his obligations, covenants or agreements, if within thirty (30) days after written notice of such failure, and the nature of it, he does not cure such failure by performance, satisfactory to said Coal Companies and to the Railway Company.

"(b) By said C. J. Devlin for a failure by either of the other parties to perform its obligations, if within thirty (30) days after written notice of such failure and the nature of it, it does not cure such failure by performance, satisfactory to said C. J. Devlin.

"In the event of a termination by either method aforesaid, such termination shall operate as to all parties hereto and extend to all the provisions hereof, except such as from their nature are to be performed in the event of termination, but such termination, or right to terminate, shall not effect the right to recover damages for any such failure, or in any way relieve either party from his or its covenants and agreements hereunder.

"Article XXI.

"If the said C. J. Devlin shall fail to pay the rental or royalties herein reserved, or any part thereof, on the day when the same become due and payable under the provisions hereof, and shall continue in such default for thirty (30) days, or if default shall be made by him in any of his covenants
37 and agreements herein contained, it shall and may be lawful for said Coal Companies, their attorneys, agents or assigns, at their election, to declare the terms herein provided for ended, and into the said demised premises, or any part thereof, either with or without process of law, to re-enter, and the said C. J. Devlin, or any other person or persons occupying, in, or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy, as their first and former estate; and to distrain for any rent, royalty or other sum that may be due hereunder, upon any property belonging to the said C. J. Devlin, whether the same be exempt from execution and distress by law or not, and said C. J. Devlin in that case hereby waives all legal rights which he now has, or may have, to hold or retain any such property under any exemption laws now in force in this State, or in any other way, meaning and intending hereby to give to the said Coal Companies, their successors and assigns, attorneys or agents, a valid and first lien upon any and all goods, chattels or other property belonging to said C. J. Devlin, which said C. J. Devlin may place upon the demised premises, as security for the payment of said rentals, royalties and other sums in the manner aforesaid, anything hereinbefore contained to the contrary notwithstanding, and at the end of the term herein provided, or sooner in case of termination as provided in Article XVII hereof; or, in case said C. J. Devlin shall fail to promptly and properly keep and perform each and every one of his covenants, undertakings and agreements herein provided for, the

said C. J. Devlin covenants and agrees to surrender and deliver up said demised premises and property, peaceably to the said Coal Companies, their successors, attorneys, agents or assigns, immediately upon such termination of said term; and if
38 said C. J. Devlin shall remain in possession of the same after notice of such default, or after the termination of this lease, in any of the ways above named, or as fixed herein, he shall be deemed guilty of a forcible detainer of the premises under the statute, and shall be subject to all the conditions and provisions hereof, and to eviction and removal, forcible or otherwise, with or without process of law, as above stated."

It is claimed by the petitioners that in as much as the verbal agreement to advance money to meet the pay rolls became engrafted upon the original lease and constituted a modification of it, that the failure to furnish sufficient coal to pay advances made, constitutes a breach of the contract which permits a cancellation of the lease, and that the Trustees in Bankruptcy should be compelled to pay the full amount due on the advances made to the Mount Carmel Coal Company, or that petitioners be permitted to exercise their option on cancelling the contract.

Expressed in the language of the petition, the claim and prayer of petitioners are as follows:

"That by reason of said failure to comply with the provisions of said contract and the delivery of coal, the said The Atchison, Topeka, & Santa Fe Railway Company, The Osage Carbon Company and Cherokee & Pittsburg Coal and Mining Company are entitled to declare said contracts and leases forfeited and void, and are entitled to the possession of the property covered by said leases, unless the receivers appointed in said bankruptcy proceedings are directed and in-
39 structed to deliver to said The Atchison, Topeka & Santa Fe Railway Company coal in an amount sufficient to liquidate the indebtedness created as aforesaid.

"Your petitioners therefore pray that J. E. Hurley, Cyrus Leland and Walter Reeves, Receivers appointed in the above entitled proceeding in bankruptcy, be directed either to deliver to said The Atchison, Topeka & Santa Fe Railway Company an amount of coal sufficient to carry out the provisions of the contracts hereinbefore set forth, as modified by the verbal contract between the said Mount Carmel Coal Company and The Atchison, Topeka & Santa Fe Railway Company, as hereinbefore set forth; or that said receivers be ordered and directed to deliver over the possession of all the lands and properties described in said written contracts hereinbefore set forth, upon the payment to said receivers of the amount provided to be

paid to said Mount Carmel Coal Company under the terms of said leases, and that the property of said Mount Carmel Coal Company, for which said payment is made, be at the same time turned over to said Cherokee & Pittsburg Coal & Mining Company, The Osage Carbon Company and The Atchison, Topeka and Santa Fe Railway Company, in full compliance with the terms and provisions of said contracts."

It is also claimed by petitioners that there are strong equities in their favor, which should be given consideration by the Court, growing out of the fact that the assistance given by them prevented the closing down of the mines and consequent disasters, and that the rights of the creditors were protected and the possibilities of receiving dividends greatly increased thereby.

The advances made by the Santa Fe Company which are before the Court for consideration, are three in number and were made under the following circumstances:

First. On April 15, 1905, the account of the Mount Carmel Coal Company with the Santa Fe Company was overdrawn to the extent of $24,063.16. The Santa Fe Company had paid to the Coal Company that much more than it was entitled to receive on account of coal delivered. In order to settle this account the Coal Company gave to the Santa Fe Company two drafts, with the understanding that if the drafts were not paid they would be charged against the amounts due it for coal for the next month. One draft was for $10,000 and the other for $14,063.16. The $10,000 draft was paid on June 19, 1905. The other draft was entended until July 1, upon the promise of the Coal Company to pay it upon that day. It was not paid upon that date and Mr. Devlin, President of the Coal Company, was informed sometime between July 1st and July 29th that the amount of it would be charged against the proceeds from coal, due the Mount Carmel Coal Company. The charge against its accounts was actually made on July 29th, 1905. The moneys advanced the Mount Carmel Coal Company, which constitute the aforesaid item of $24,063.16, were advanced in the manner heretofore stated, for the purpose of enabling the Mount Carmel Coal Company to meets its pay rolls. Just when they were made is not disclosed by the testimony.

Second. On May 23, 1905, $20,280.00 was advanced the Mount Carmel Coal Company by the Santa Fe Company to enable it to meet its pay rolls. The advance was to be paid by July 1905 coal vouchers. The testimony is uncertain as to whether the money was paid direct to the Coal Company or whether it was to be used to take up a note due the

National Bank of Commerce at Kansas City, and a new note given by the Coal Company to the bank to raise the ne-
41 cessary funds to meet its pay rolls.

A question propounded to Mr. Wellman and his answer thereto, found on page 99 of the transcript of testimony, would indicate that the money was used to take up some obligation. They are as follows:

"Why do you say this $20,280 was money obtained and used by Mr. Devlin on May 23rd? A. Because Mr. Devlin represented to us that if he took up that obligation he could get his money for the pay roll."

Third. The third item, amounting to $33,247.50, was advanced to the Coal Company to take up a note for that amount due the American National Bank of Kansas City. This was done to enable the Coal Company to borrow a similar amount from the bank to meet its pay rolls. The money was paid to the bank and the note taken up on July 3rd, 1905. The note was turned over to the Santa Fe Company by the Bank and it is now in the possession of that Company.

Various credits have been allowed against these advancements, as appears by an exhibit attached to the petition, reducing the amount of petitioner's claim to $57,304.16.

I am unable to find any testimony indicating an intention to modify the written lease as claimed by petitioners. There certainly was no express oral agreement to that effect. It is true, the advances were to be paid by money due the Coal Company for Coal furnished the Santa Fe Company, and the money, instead of being paid under the terms of the written contract, would be kept to reimburse the Santa Fe Company for money advanced. But this amounts to the same thing as saying, that the Santa Fe Company merely paid for its coal in advance, although not required to do so by the terms of the contract. I cannot construe this to
42 mean that the written contract was necessarily modified by the agreement to advance moneys to meet the pay rolls. I regard the verbal agreement as a separate, independent, parol contract, in no respect inconsistent, with the written contract. I am of the opinion that it did not become a part of the main contract by express agreement or necessary implication, and that the Santa Fe Company is not entitled to a cancellation of the lease on account of a failure to furnish coal to pay advances made, to meet pay rolls.

Although there are equities in favor of petitioner's claim, by reason of having advanced money to meet pay rolls and keep

the Mount Carmel Coal Company a going concern, I can find nothing in the law which will justify the court in giving the claim priority over those of other creditors.

It must be apparent that the advances were for the benefit of the Santa Fe Company as well as the Mount Carmel Coal Company. It was important that it be kept supplied with coal to operate its road, and the shutting down of these mines might have caused embarrassment to the Santa Fe Company. Futhermore, its interest in the mining properties leased to the Mount Carmel Coal Company was protected by keeping the property in operation.

The testimony also shows that the advancements were made in accordance with a practice which had been followed for a considerable time.

An order will be entered denying the relief prayed for by the petitioners.

All objections made by the attorney for the Trustee, where ruling was reserved, are overruled.

Dated Jan. 27, 1906. N. H. LOOMIS, Referee.

43 In the District Court of the United States for the District of Kansas, First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt. In Bankruptcy.

Notice.

To J. E. Hurley, Cyrus Leland and Walter Reeves, Receivers:

You and each of you are hereby notified that on the 20th day of November, A. D. 1905, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, at Chambers at Topeka, Kansas, before Honorable John C. Pollock, Judge of the United States District Court in and for the District of Kansas, The Atchison, Topeka & Santa Fe Railway Company, Cherokee & Pittsburg Coal & Mining Company and the Osage Carbon Company will appear and request permission of said Court to file an intervening petition in said above entitled cause, a copy of which proposed intervening petition is hereto attached, and shall ask for an order in accordance with the prayer thereof, when and where you may appear, etc.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.
CHEROKEE & PITTSBURG COAL & MINING CO.
THE OSAGE CARBON COMPANY.

By Wm. R. Smith and O. J. Wood,
Their Attorneys.

Dated at Topeka, Kansas, November 1st, 1905.

Service of a copy of the foregoing notice and within petition accepted this 1st day of November, 1905.

J. E. HURLEY, C. LELAND Jr.,
Receivers.

In the District Court of the United States, for the District of Kansas, First Division.

44 In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Petition of the Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and Cherokee & Pittsburg Coal & Mining Company.

Your petitioners, The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and Cherokee & Pittsburg Coal & Mining Company respectively represent that they are Corporations organized and existing under the laws of the State of Kansas.

Your petitioners further show that on or about the first day of October, 1896, they entered into a contract with one Charles J. Devlin, a copy of which contract is hereto attached and made a part of this petition and marked "Exhibit A."

That afterwards said Contract, by and with the consent of The Osage Carbon Company, Cherokee & Pittsburg Coal & Mining Company and The Atchison, Topeka & Santa Fe Railway Company, was duly assigned to The Mount Carmel Coal Company, a corporation organized and existing under the laws of the State of West Virginia, a copy of which assignment is hereto attached, and made a part of this petition and marked "Exhibit B".

45 Afterwards, on the First day of June, 1898, a contract was made between The Osage Carbon Company, Cherokee & Pittsburg Coal & Mining Company and The Atchison, Topeka & Santa Fe Railway Company, extending and modifying said first named agreement, a copy of which said contract of June 1st, 1898, is hereto attached and made a part of this petition and marked "Exhibit C"

That afterwards, on the thirtieth day of August, 1900, a contract was duly entered into between The Osage Carbon Company Cherokee & Pittsburg Coal & Mining Company and Mount Carmel Coal Company and The Atchison, Topeka & Santa Fe Railway Company, extending said last named contract until

June 1, 1906, a copy of which contract dated August 30, 1900, is hereto attached and made a part of this petition and marked "Exhibit D."

That afterwards said Mount Carmel Coal Company, by its President Charles J. Devlin, duly authorized, represented to The Atchison, Topeka & Santa Fe Railway Company that it was impossible for said Mount Carmel Coal Company to pay off the laborers engaged in mining coal by said Mount Carmel Coal Company upon the lands described in the leases and contracts hereinbefore referred to, unless The Atchison, Topeka & Santa Fe Railway Company would advance to said Mount Carmel Coal Company enough moneys to enable the said Mount Carmel Coal Company to pay the laborers engaged in operating said mines. And it was thereupon agreed between the said Mount Carmel Coal Company and the said The Atchison, Topeka & Santa Fe Railway Company that the contracts and extensions thereof, hereinbefore referred to, should be modified to extent that the said Railway Company should advance the necessary moneys to pay off the laborers and
46 keep said mines in operation and for the money so advanced the said Mount Carmel Coal Company should deliver to the said The Atchison, Topeka & Santa Fe Railway Company, during the months of July, 1905, and August, 1905, a sufficient amount of coal at the prices provided for in the contracts hereinbefore referred to to fully cancel and liquidate the indebtedness thereby created.

Your petitioners further represent that in compliance with this verbal [midification] of the written contracts hereinbefore set out said The Atchison, Topeka & Santa Fe Railway Company furnished to said Mount Carmel Coal Company money to the amount of Sixty Six Thousand Nine Hundred and forty-seven and 7-100 Dollars ($66947.07), as shown by itemized statement of account hereto attached and made a part of this petition and marked "Exhibit E." That there is a credit due upon said amount advanced, in the sum of Nine Thousand, Six hundred and Forty-two and 91-100 Dollars ($9642.91). An itemized account of said credits is hereto attached and made a part of this petition and marked "Exhibit F." That there is a balance due on account of the moneys advanced in accordance with the terms of the verbal contract hereinbefore set forth from said Mount Carmel Coal Company to The Atchison, Topeka & Santa Fe Railway Company, in the sum of Fifty Seven Thousand, Three Hundred and Four and 16-100 Dollars ($57304.16), which amount should have been fully paid and liquidated by the delivery of coal in accordance with the
47 terms of said verbal contract, during the months of July and August, 1905.

That on account of the bankruptcy proceedings in this Court on the seventh day of July, 1905, in the matter of the petition in bankruptcy of Charles J. Devlin, Mount Carmel Coal Company et al, and the receivers appointed in said proceedings by the Court on said day having taken possession of the mines heretofore operated by said Mount Carmel Coal Company, under the provisions of said several contracts hereinbefore set forth, the said Mount Carmel Coal Company failed to carry out its contract with The Atchison, Topeka & Santa Fe Railway Company, Cherokee & Pittsburg Coal and Mining Company, The Osage Carbon Company, as modified by the verbal contract between the said Mount Carmel Coal Company and the said The Atchison, Topeka and Santa Fe Railway Company, as hereinbefore set forth, and said Mount Carmel Coal Company did not nor any one for it deliver to The Atchison, Topeka & Santa Fe Railway Company coal in payment of said amounts advanced.

That by reason of said failure to comply with the provisions of said contract and the delivery of the coal, the said The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and Cherokee & Pittsburg Coal and Mining Company are entitled to declare said contracts and leases forfeited and void and are entitled to the possession of the property covered by said leases, unless the receivers appointed in said bankruptcy proceedings are directed and instructed to deliver to said The Atchison, Topeka and Santa Fe Railway Company coal in an amount sufficient to liquidate the indebtedness created as aforesaid.

Your petitioners therefore pray that J. E. Hurley,
48 Cyrus Leland and Walter Reeves, receivers appointed in the above entitled proceedings in bankruptcy, be directed either to deliver to said The Atchison, Topeka & Santa Fe Railway Company an amount of coal sufficient to carry out the provisions of the contract hereinbefore set forth, as modified by the verbal contract between the said Mount Carmel Coal Company and the Atchison, Topeka and Santa Fe Railway Company, as hereinbefore set forth; or that said receivers be ordered and directed to deliver over the possession of all the lands and properties described in said written contracts hereinbefore set forth, upon the payment to said receivers of the amount provided to be paid to said Mount Carmel Coal Company under the terms of said leases, and that the property of said Mount Carmel Coal Company, for which said payment is made, be at the same time turned over to said Cherokee & Pittsburg Coal and Mining Company, The Osage Carbon Com-

pany and The Atchison, Topeka & Santa Fe Railway Company, in full compliance with the terms and provisions of said contract.

WM. R. SMITH
O. J. WOOD,
Attorneys for Petitioners.

State of Kansas,
Shawnee County—ss.

E. Wilder, being of lawful age and being duly sworn,
49 on oath states, that he is the secretary and treasurer of the above named petitioner, The Atchison, Topeka & Santa Fe Railway Company and held such office during all the time covered by the contracts, leases and extensions mentioned in the above and foregoing petition. That he has read and knows the contents of the above and foregoing petition and that the matters, things and statements therein contained are true.

E. WILDER.

Subscribed in my presence and sworn to before me this first day of November, 1095

GEO. W. PORTER,
Seal N. P. Notary Public.

My commission expires January 21, 1907.

[Copy. Original is typewritten without marginal notes and heading to and including "Lease and Agreement."]

A. T. Secretary's No. **10886.**

**Charles J. Devlin** { **The Osage Carbon Co.**
**Cherokee & Pittsburg Coal & Mining Co.**
**The Atchison, Topeka & Santa Fe Railway Co.**

**October 1, 1896. Expires October 1, 1899.**

## LEASE AND AGREEMENT.

Parties to agreement: Osage Carbon Co., Cherokee & Pittsburg C. & M. Co., C. J. Devlin, The A. T. & S. F. Rly. Co.

**This Agreement** made the first day of October, A. D. 1896, by and between THE OSAGE CARBON COMPANY and the CHEROKEE & PITTSBURG COAL & MINING COMPANY, (hereinafter called the "Coal Companies,") parties of the first part; CHARLES J. DEVLIN, (hereinafter called "C. J. Devlin,") party of the second part, and THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, (hereinafter called the "Railway Company,") party of the third part.

WITNESSETH THAT:

WHEREAS, Said C. J. Devlin desires to lease the coal lands and properties of the Coal Companies and also desires to furnish said Railway Company with coal for use upon certain of its railways: and

WHEREAS, Said Coal Companies are willing to lease their said lands and properties and said Railway Company is willing to purchase coal from said C. J. Devlin to the extent, at the prices and upon the conditions hereinafter fixed,

NOW, THEREFORE, Said parties do mutually covenant and agree with each other as follows:

### ARTICLE 1.

Lease from Osage Carbon Co. Term 3 years.

THE said THE OSAGE CARBON COMPANY, for itself, hereby demises and leases to the said C. J. Devlin, for the term of three years from and after the date hereof, unless sooner terminated as hereinafter provided, the following-described real estate and personal property, situated in the county of Osage, in the state of Kansas, viz.: *All its coal and mineral rights in:*

Coal and mineral rights.

Description of real estate.

**Township 14 South, Range 15 East.**

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| N.W. ¼ | 26 | 160 |
| N.E. ¼ | 34 | 160 |
| S.E. ¼ lying north of A. T. & S. F. R. R. | 34 | 47.46 |
| S.W. ¼ lying north of A. T. & S. F. R. R. | 34 | 143.29 |
| S.E. ¼ | 33 | 160 |

**Township 15 South, Range 15 East.**

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| N.E. ¼ of N.E. ¼ | 3 | 39.42 |
| S. ½ of N.E. ¼ | 3 | 80 |
| S.E. ¼ | 3 | 160 |
| N.E. ¼ | 4 | 150.59 |
| S. ½ | 4 | 320 |

**Twp. 15 South, Range 15 East**—*Concl.*

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| S.E. ¼ | 5 | 160 |
| N.E. ¼ | 7 | 160 |
| N.E. ¼ | 8 | 160 |
| N.W. ¼ | 17 | 160 |
| E. ½ of N.E. ¼ | 30 | 80 |
| W. ½ of W. ½ of N.E. ¼ | 30 | 40 |

**Township 15 South, Range 14 East.**

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| N.W. ¼, part of | 36 | 3 |
| N.E. ¼ | 35 | 160 |
| S.E. ¼ | 35 | 153.80 |
| E. ½ of N.W. ¼ | 35 | 72 |
| S.W. ¼ | 35 | 160 |

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**Township 10 South, Range 14 East.**

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| S.W. ¼ | 1 | 160 |
| N.E. ¼ | 2 | 162.24 |
| S. ½ | 2 | 320 |
| E. ½ of N.W. ¼ | 2 | 81.10 |
| N.E. ¼ | 3 | 161.47 |
| E. ½ of N.W. ¼ | 3 | 80.10 |
| S. ½ | 3 | 320 |
| N. ½ of N.E. ¼ | 10 | 80 |
| N.W. ¼ of | 10 | 160 |
| S. ½ | 10 | 320 |
| All of | 11 | 640 |
| N. ½ of N.W. ¼ | 12 | 80 |
| S.E. ¼ of N.W. ¼ | 12 | 40 |
| S.W. ¼ | 12 | 160 |
| E. ½ | 12 | 320 |
| All of | 13 | 640 |
| E. ½ | 14 | 320 |
| S.W. ¼ | 14 | 160 |
| N. ½ | 15 | 320 |
| S.W. ¼ | 15 | 160 |
| S.E. ¼, except S.E. ¼ of S.E. ¼ | 15 | 150 |
| N. ½ | 22 | 320 |
| N.E. ¼ | 23 | 160 |
| S.E. ¼ | 23 | 139.50 |
| N. ½ of N.W. ¼ | 23 | 80 |
| W. ½ of S.W. ¼ of N.W. ¼ | 23 | 20 |
| E. ½ of S.E. ¼ of N.W. ¼ | 23 | 20 |
| W. 5 acres of S. ½ of S.E. ¼ of N.W. ¼ | 23 | 5 |

**Township 16 South, Range 14 East.**

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| S.W. ¼ of N.E. ¼ of S.W. ¼ | 23 | 10 |
| N.E. ¼ of N.W. ¼ of S.W. ¼ | 23 | 10 |
| S.W. ¼ of N.W. ¼ of S.W. ¼ | 23 | 10 |
| N. 55 acres of S. ½ of S.W. ¼ | 23 | 55 |
| All of | 24 | 640 |
| All of | 25 | 640 |
| S.E. ¼ of N.E. ¼ | 26 | 38 |
| W. ½ of S.E. ¼ S.E. ¼ | 26 | 20 |
| N.W. ¼ of S.E. ¼ | 26 | 40 |
| W. 10 acres of N.E. ¼ of S.W. ¼ | 26 | 10 |
| S.W. part of | 26 | 12 |
| N. 10 acres of N.E. ¼ of N.E. ¼ | 27 | 10 |
| W. ½ of N.E. ¼ | 27 | 80 |
| S.W. ¼ | 27 | 160 |
| S. ½ | 28 | 320 |
| All of | 33 | 640 |
| All of | 34 | 640 |
| S. ½ except N.E. ¼ of N.E. ¼ of S.E. ¼ | 35 | 310 |
| W. 120 acres of N.W. ¼ | 36 | 120 |

**Township 16 South, Range 15 East.**

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| S. ½ | 4 | 320 |
| S. ½ of N.W. ¼ | 4 | 80 |
| N.E. ¼ of N.W. ¼ | 4 | 36.77 |
| N.W. ¼ of N.W. ¼ | 4 | 36.82 |
| S.E. ¼ | 5 | 160 |
| S. ½ of N.E. ¼ | 5 | 80 |
| N.E. ¼ of N.E. ¼ | 5 | 36.76 |
| N.W. ¼ of N.E. ¼ | 5 | 37.06 |
| S.E. ¼ | 6 | 160 |
| N.W. ¼ | 7 | 140.20 |
| S.W. ¼ | 7 | 140.60 |
| S.E. ¼ | 7 | 160 |
| E. 50 acres of N. ½ of N.E. ¼ | 7 | 50 |
| S.W. ¼ of N.E. ¼ | 7 | 40 |
| E. ½ | 8 | 320 |
| S. ½ of S.W. ¼ | 8 | 80 |
| All of | 9 | 640 |
| N. ½ | 10 | 320 |
| N.W. ¼ of N.W. ¼, part of, | 11 | 23.62 |
| S.W. ¼ of N.W. ¼, " " | 11 | 24.26 |
| N.W. ¼ of S.W. ¼, " " | 11 | 24.90 |
| S.W. ¼ of S.W. ¼, " " | 11 | 25.54 |
| N.W. ¼ of N.W. ¼, " " | 14 | 26.08 |
| S.W. ¼ of N.W. ¼, " " | 14 | 26.51 |
| N.W. ¼ of S.W. ¼, " " | 14 | 26.95 |
| S.W. ¼ of S.W. ¼, " " | 14 | 27.38 |
| S. ½ of N.E. ¼ | 15 | 80 |
| S. ½ | 15 | 320 |
| All of | 16 | 640 |
| N. ½ of N.E. ¼ | 17 | 80 |
| W. ½ | 17 | 320 |
| S.E. ¼ | 17 | 160 |
| S.E. ¼ | 18 | 160 |
| S.W. ¼ | 18 | 137.83 |
| N.W. ¼ | 19 | 137.05 |
| N.E. ¼ | 19 | 160 |
| N. ½ | 20 | 320 |
| N.E. ¼ of S.W. ¼ | 20 | 40 |
| N. ½ of S.E. ¼ | 20 | 80 |
| E. 60 acres of S. ½ of S.E. ¼ | 20 | 60 |
| All of | 21 | 640 |
| All of | 22 | 640 |
| N.W. ¼ of N.W. ¼, part of, | 23 | 28.15 |
| S.W. ¼ of N.W. ¼, " " | 23 | 29.23 |
| N.W. ¼ of S.W. ¼, " " | 23 | 30.33 |
| S.W. ¼ of S.W. ¼, " " | 23 | 31.41 |

**Township 17 South, Range 14 East.**

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| N.E. ¼ | 3 | 161.30 |
| N.W. ¼ | 3 | 161.50 |
| S. ½ | 3 | 320 |
| N.E. ¼ | 4 | 161.50 |
| N.W. ¼ | 4 | 161.50 |
| All of | 9 | 640 |
| W. ½ | 13 | 320 |

**Twp. 17 South, Range 14 East**—*Cont.*

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| W. ½ of N.W. ¼ | 19 | 78.60 |
| S.W. ¼ | 19 | 159 |
| S.E. ¼ | 19 | 160 |
| W. ½ of N.W. ¼ | 25 | 80 |
| E. ½ | 26 | 320 |
| N.W. ¼ | 26 | 160 |
| N.W. ¼ | 30 | 159.10 |

**Twp. 17 South, Range 14 East**—*Concl.*

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| S.W. ¼ | 30 | 158.90 |
| S.E. ¼ | 30 | 160 |
| N.E. ¼ | 31 | 160 |
| S. ½ of N.W. ¼ | 31 | 79.72 |
| Total acreage being, more or less. | | 22,812.34 |

ALSO all the coal and mineral rights in the following-described leased land, in Osage county, state of Kansas:

**Township 16 South, Range 14 East.**

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| S.W. ¼ of S.E. ¼ | 22 | 40 |

Other lands.

AND ALSO, all its coal and mineral rights in any other lands belonging to the Osage Carbon Company, not specifically mentioned herein:

Personal property.

TOGETHER: with the coal mines, railway tracks and all buildings, structures, tenement houses, machinery, engines, boilers, rails, cars, tools, fixtures, implements, appliances, equipment and other property appurtenant to or used in connection with said

Right to mine.

coal mines, and the maintenance and operation thereof, with the full right of mining, extracting, removing and selling the coal in said lands, and also all the rights and privileges thereto incident, or appurtenant, or therewith usually had and enjoyed, including the use of so much of the surface of said lands as may be necessary, or desirable in connection with the operation of said mines, or the opening, equipment and operation of additional mines: and

Lease from Cherokee & Pittsburg C. & M. Co.

Term 3 years.

The said Cherokee & Pittsburg Coal & Mining Company, for itself, hereby demises and leases to the said C. J. Devlin, for the term of three years from and after the date hereof, unless sooner terminated as hereinafter provided, the following-described real estate and personal property, situated in the county of Crawford in the state of Kansas,

Coal and mineral rights.

viz.: *All its coal and mineral rights in:*

**Township 29 South, Range 25 East.**

Description of real estate.

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| S.E. ¼ of S.E. ¼ | 32 | 40 |

**Township 30 South, Range 25 East.**

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| S. ½ of N.W. ¼ | 3 | 80 |
| S.W. ¼ | 3 | 160 |
| S. ½ of N.E. ¼ | 4 | 80 |
| S. ½ | 4 | 320 |
| S. ½ of N.W. ¼ | 4 | 80 |
| N.E. ¼ of N.W. ¼ | 4 | 40 |
| N.W. ¼ of N.W. ¼ | 4 | 40 |
| N.E. ¼ of N.E. ¼ | 5 | 40 |
| S.E. ¼ of N.E. ¼ | 5 | 40 |
| N.E. ¼ of N.W. ¼ (Lots 1, 2, 3, 4 & 5, plat of est'te of J. J. Carlton.) | 5 | 161.12 |
| N.W. ¼ of N.W. ¼ | | |
| S. ½ of N.W. ¼ | | |
| S. ½ | 5 | 320 |
| N. ½ | 8 | 320 |
| S.E. ¼ | 8 | 160 |
| E. ½ of S.W. ¼ | 8 | 80 |
| N.W. ¼ of S.W. ¼, except about 10 acres, | 8 | 30 |
| All of | 9 | 640 |
| N. ½ of N.W. ¼ | 10 | 80 |
| N.E. ¼ of N.W. ¼ | 17 | 40 |

**Township 30 South, Range 24 East.**

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| S.E. ¼ of S.W. ¼, part of (W. ½) | 25 | 26.66 |
| S.W. ¼ of S.W. ¼ | 25 | 40 |
| S.W. ¼ | 26 | 160 |
| S.E. ¼ | 27 | 160 |
| S. ½ of N.E. ¼ | 27 | 80 |
| N.E ¼ | 34 | 160 |
| S. ½ of S.E. ¼ | 34 | 80 |
| N.E. ¼ of S.E. ¼ | 34 | 40 |
| All of | 35 | 640 |
| S.W. ¼ of | 36 | 160 |
| W. ½ of N.W. ¼ | 36 | 80 |
| W. part of E. ½ of N.W. ¼ | 36 | 53.33 |

**Township 31 South, Range 24 East.**

| *Part of section.* | *Section.* | *Acres.* |
|---|---|---|
| N.W. ¼ | 1 | 158.39 |
| All of | 2 | 636.10 |
| N.E. ¼ E. ½ of N.W. ¼ E. ½ of S.E. ¼ | 3 | 316.40 |
| Total acreage, more or less, | | 3,542 |

Other lands.

ALSO its coal and mineral rights in any other lands belonging to the Cherokee & Pittsburg Coal & Mining Company, not specifically mentioned herein:

Surface land.

Also, one hundred and sixty acres of surface land, in Crawford county, Kansas, described as follows: The S. W. ¼ of Section 5, Township 30 South, Range 25 East.

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Personal property.

together with the coal mines, railway tracks and all buildings, structures, tenement houses, machinery, engines, boilers, rails, cars, tools, fixtures, implements, appliances, equipment and other property appurtenant to or used in connection with said coal mines and the maintenance and operation thereof, including one hay barn at Chicopee,

Right to mine.

with the full right of mining, extracting, removing and selling the coal in said lands and also the rights and privileges thereto incident, or appurtenant, or therewith usually had or enjoyed, including the use of so much of the surface of said lands as may be necessary or desirable in connection with the operation of said mines, or the opening,

Excepting right-of-way to Rly. Co.

equipment and operation of additional mines; PROVIDED, that there shall be excepted from this agreement the present right of way and tracks belonging to the Railway Company and there is hereby reserved to each of said Coal Companies respectively the right

Farming and grazing rights reserved.

to lease for farming or grazing purposes any of the surface of the lands hereby demised not required in connection with said mines and to collect and retain the revenues and rentals therefrom, if thereby no unreasonable interference is caused said C. J. Devlin in the operation of the coal mines hereby demised, and PROVIDED, FURTHER, that

Not to undermine right-of-way.

no coal shall be mined from under the right of way or tracks which may now or hereafter belong to or be controlled or operated by the Railway Company, without its written consent.

## ARTICLE II.

Peaceful possession guaranteed.

EACH of said Coal Companies, for itself, respectively covenants and agrees that it will secure said C. J. Devlin, during the term hereof, in the quiet and peaceful possession of the property hereby demised.

## ARTICLE III.

C. J. D. to purchase supplies, etc.

SAID C. J. Devlin shall purchase from said Coal Compaies all of the mules, harness, mine supplies and stocks of material at the respective mines of said Coal Com-

Excepting equipment.

panies at the date hereof, but surplus machinery, tools and mine equipment shall not be considered as "mine supplies."

Inventory.

An inventory of all the articles to be purchased by said C. J. Devlin as aforesaid shall be taken by an agent of his appointment and an agent appointed by the Coal Companies, who shall together fix the value of all mules, harness, mine supplies and stocks of material, which the said C. J. Devlin is to buy, and, in case of their disagreement, then the sum to be paid by C. J. Devlin shall be arbitrated as hereinafter provided.

## ARTICLE IV

Monthly statements of coal mined.

SAID C. J. Devlin shall furnish to the Treasurer of each of said Coal Companies, on or before the tenth day of each month, a full and correct statement of the amount of coal mined from the lands of each company during the preceding calendar month, and said Coal Companies and the said Railway Company shall, at all reasonable times,

Right to inspect books.

have access to and the right to inspect all books of account and papers of the said C. J. Devlin pertaining to the operation of any of the mines hereby leased, or the conduct of his business in connection therewith.

Annual statements.

Said C. J. Devlin shall also, on the first day of October, 1897, and at the end of each year thereafter, during the term of this lease, furnish each of the Coal Companies with a sworn statement of the receipts and disbursements from operating the properties of such company hereby leased during the preceding year, and said Coal Companies

Right to verify.

shall have the right to inspect and examine any books and papers of the said C. J. Devlin pertaining to such business in order to verify the figures so submitted.

## ARTICLE V.

Royalty.

SAID C. J. Devlin shall pay during the full term of this agreement, as royalty on each ton of two thousand pounds of "lump" or "run of mine" coal mined from the leased premises, the sum of nine (9) cents.

Nut, pea or slack coal.

No royalty shall be paid on nut, pea or slack coal mined from any of the lands hereby demised.

Minimum royalty.

The minimum royalty to be paid under this agreement shall be $2,750 per month, regardless of whether any coal is mined from the premises hereby demised, said minimum to be divided between the Coal Companies as they may agree, PROVIDED, that in

Provision for exhaustion of coal, etc.

the event of the exhaustion of the workable coal available to the mines now open on the premises demised, its deterioration in quality, or in the event of labor strikes, or interruptions of railway transportation, rendering it impracticable to mine in any one year two hundred thousand (200,000) tons of coal, subject to the royalties hereby affixed,

Reduction of minimum.

then the minimum royalty herein provided shall be equitably and correspondingly reduced, and, in case of a disagreement by the parties hereto as to what would be an equitable reduction in such case, or cases, then the question shall be decided by arbitration as hereinafter provided, but no claim for any reduction of the minimum royalty

Notice of claim for reduction.

shall be valid unless said C. J. Devlin shall, immediately upon the happening of the event entitling him to such claim, give notice thereof in writing to the coal companies,

Excess of royalty may be deducted when coal is mined.

and PROVIDED, FURTHER, that in case royalty is paid in excess of coal actually mined in any month, such excess may be deducted from royalties accruing at any time thereafter on coal actually mined during the year then current, in excess of the minimum above specified, but no such excess accruing in any one year shall be taken into consideration in connection with the business of any other year.

## ARTICLE VI

Defining.

THE terms "lump" and "run of mine" coal as used in the foregoing article are understood to mean as follows, viz.:

Lump coal.

(*a*) LUMP COAL: All coal that will pass over screens having a space of seven-eighths inches between the bars, or an equivalent wire-mesh screen, shall be classified as "lump coal." In case screens having wider or narrower spaces are used, the amount of lump coal shall be estimated from the results of the actual tests.

Run of mine coal.

(*b*) RUN OF MINE COAL: When coal is not screened but is loaded in cars and sold as it comes from the mine, it shall be classified as "run of mine coal."

## ARTICLE VII

Rental

SAID C. J. Devlin shall, as rental for the demised premises, in addition to the royalties hereinbefore reserved, make the following monthly payments during the term hereof, viz.:

C. & P. C. & M. Co.

(*a*) To the Cherokee & Pittsburg Coal & Mining Company $150 per month.

Osage C. Co.

(*b*) To the Osage Carbon Company $100 per month.

## ARTICLE VIII.

C. J. D. to pay damages for injury to persons or property.

SAID C. J. Devlin shall indemnify and save harmless the said Coal Companies and the said Railway Company against all claims or demands that shall be made against them, for or on account of injuries to persons or to property, or death, resulting from mining operations under this lease upon any of the lands hereby demised or the business incidental thereto and he shall also pay and satisfy each and every judgment that shall be rendered against either of the parties hereto in any action instituted to recover damages to persons or property, or for death, when occasioned by mining operations under this lease, or business incidental thereto, upon any of the lands hereby demised,

Except those resulting from switching cars by Rly. Co.

PROVIDED, that said C. J. Devlin, in the absence of his negligence or the negligence of his employes, shall not be liable for injuries to persons or property or death resulting from the switching of cars by the Railway Company.

## ARTICLE IX.

Bond $100,000.

SAID Devlin shall give a good and sufficient bond in the penal sum of one hundred thousand dollars ($100,000) for the full and faithful performance of his covenants and agreements herein contained, which bond shall be signed by three sureties, each of whom shall be satisfactory to the president and treasurer of the Railway Company.

## ARTICLE X.

C. J. D. to insure.

SAID C. J. Devlin shall keep all the buildings, tenements, structures, and machinery, located upon the premises hereby demised, insured against loss by fire in such

Policies payable to Coal Co.

companies and amounts as may be agreed upon, and each policy shall be made payable to the Coal Company owning the property so insured.

## ARTICLE XI.

C. J. D. to conduct operations and business in workmanlike manner.

SAID C. J. Devlin shall conduct all the mining operations and business incidental thereto, in a careful, proper and workmanlike manner and shall do all things that may be necessary, in order that the future operations of the mines, after the term hereof, may be safe and practicable and in no way impaired, save as expressly permitted herein, and it is agreed that the proper conduct of such operations shall, in addition to other things, require said C. J. Devlin to properly timber and support, where necessary, the roof in all rooms and entries worked, as far as practicable.

## ARTICLE XII.

Right and obligation to inspect mines by owners.

SAID Coal Companies, and each of them, shall, at all reasonable times, have the right to inspect, and they shall, by an agent in connection with an agent of said C. J. Devlin, inspect during March in each year the workings of their respective mines, and ascertain if the operations are being conducted as herein contemplated. In case such agents shall find and report in writing that the operations are not so carried on, or will unnecessarily endanger the future operations of the mine, or mines, specifying the defects or failures, then and in that event said C. J. Devlin shall, without unreasonable delay, conform to the suggestions of said report.

IF, however, such agents shall disagree on any matter as the result of such inspection, the same shall be immediately submitted to arbitration and speedily determined as hereinafter provided, but it is expressly understood and agreed that the provisions of this Article are intended as an additional security to the Coal Companies for the protection of their property, and that nothing herein contained shall relieve said C. J. Devlin from his liability under any covenant contained in any other of the articles hereof.

## ARTICLE XIII.

Right to remove equipment.

SAID C. J. Devlin shall have the right to remove from any of the aforesaid mines to another thereof any tools or equipments which he may deem advisable, but he shall give written notice to the Coal Companies, specifying in detail the articles so removed.

## ARTICLE XIV.

Taxes to be paid by owners.

EACH of said Coal Companies shall pay, before they become delinquent, all lawful taxes or assessments levied against any of its property hereby leased. In the event that either of said Coal Companies shall fail to pay, when due, all lawful taxes or assessments or the principal or interest upon indebtedness secured by mortgage on its property, then said C. J. Devlin may pay said tax, assessment, principal or interest, and deduct the amount, or amounts, so paid from the first royalties or rentals thereafter accruing hereunder, with legal interest, and continue to make such deductions until the same shall equal the amount, or amounts, so paid for taxes, assessments, principal or interest.

C. J. D. may pay taxes and other liens and deduct from royalty.

## ARTICLE XV.

Leases.

SAID Coal Companies shall, so far as they may legally do so, assign to said C. J. Devlin their interest in any leases which they may have for real or personal property, mining rights, mining machines or other patent rights, in any way connected with, appurtenant to or which could be used to advantage in connection with the lands, mines, stores or other property hereby leased, and said C. J. Devlin shall, on the termination hereof, reassign to said Coal Companies all such leases and patent rights in this article referred to as may be then in force, and said C. J. Devlin shall assume and pay, during the term hereof, all rentals, charges or other sums which may become due or payable according to the terms of any lease or agreement falling within the provisions of this article, from the date hereof until the expiration of the term herein provided and thereafter until such time as he may, by agreements proper in form, reconvey to the Coal Companies all interest which may have been assigned to him under the provisions of this article. Said C. J. Devlin shall not be required to pay any rentals, royalties or other sums which may have become due under said leases or agreements prior to the date hereof.

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## ARTICLE XVI.

Payments.

THAT C. J. Devlin shall, on or before the 20th day of each month, make the payments required of him herein for all royalties, rentals or other sums accruing during the preceding calendar month, such payments to be made to the respective treasurers of the Coal Companies at Topeka.

## ARTICLE XVII.

Term 3 years.

THIS lease and agreement shall continue for three (3) years from the date hereof,

Agreement may be terminated:

but may be terminated by and at the option of either of the three parties hereto as follows:

By Coal Cos or Rly. Co.

(*a*) By the Coal Companies, or the Railway Company, for a failure by said C. J. Devlin to perform any of his obligations, covenants or agreements, if within thirty (30) days after written notice of such failure, and the nature of it, he does not cure such failure by performance, satisfactory to said Coal Companies and to the Railway Company.

By C. J. D.

(*b*) By said C. J. Devlin for a failure by either of the other parties to perform its obligations, if within thirty (30) days after written notice of such failure and the nature of it, it does not cure such failure by performance, satisfactory to said C. J. Devlin.

In the event of a termination by either method aforesaid, such termination shall operate as to all parties hereto and extend to all the provisions hereof, except such as from their nature are to be performed in the event of termination, but such termination, or right to terminate, shall not affect the right to recover damages for any such failure, or in any way relieve either party from his or its covenants and agreements hereunder.

## ARTICLE XVIII.

Coal Cos. to purchase supplies at end of agreement.

THAT upon the termination of this lease and agreement, either by the expiration thereof or in the manner provided in the preceding article, the Coal Companies shall purchase from said C. J. Devlin, as follows:

Mules, etc.

1. The mules, harness and mine supplies then in use at the mines on their respective lands.

Mdse. at stores.

2. The stocks of merchandise then in the respective stores, acquired by said C. J. Devlin hereunder.

Coal-yard equipment.

3. The office buildings, furniture and equipment at any retail coal yards acquired by said C. J. Devlin hereunder.

Stocks of coal.

4. The stocks of coal then in such yards.

Mine equipment.

5. The mine rails, pit cars and tools in and at the respective mines, which may have been furnished by said C. J. Devlin, in excess of similar articles at such mines on October 1, 1896.

Buildings, etc.

6. Such buildings, equipment and improvements as may have been placed on their respective lands by said C. J. Devlin, at his own expense, with the written consent of the coal company owning such lands.

The amount to be paid C. J. Devlin by said coal companies for such articles shall be ascertained in the following manner:

Inventory to be taken.

An inventory of the articles shall be taken by an agent of said C. J. Devlin and an agent of the Coal Companies, and the value of all such articles as fixed by such agents shall be the sum to be paid by the Coal Companies; unless said agents shall disagree, in which event the amount to be paid shall be determined by arbitration, as hereinafter provided; PROVIDED, FURTHER, that the Coal Companies shall not be required to purchase of said C. J. Devlin, under the provisions hereof, articles different in character from those which said C. J. Devlin is required to purchase at this time from the Coal Companies, the purpose of this article being to provide that, at the expiration of the term herein fixed, said Coal Companies shall purchase from said C. J. Devlin all articles of the character which, by the terms hereof, he is now required to purchase from the Coal Companies.

## ARTICLE XIX.

Care of equipment, etc.

SAID C. J. Devlin shall, at the expiration of the time fixed in this lease and agreement mentioned, or sooner, if terminated as provided in Article XVII hereof, yield up said demised premises, including all buildings, tools, machinery and equipment, to the Coal Companies, in as good order as they now are, loss by fire, mining operations, in-

evitable accident and ordinary wear and tear excepted, but the term "mining operations" as used in this article, shall only include such as may be conducted in a careful, prudent and workmanlike manner.

## ARTICLE XX.

Coal Cos.' right to purchase improvements.

THAT upon the termination hereof the Coal Companies shall have the option, for a period of thirty (30) days, to purchase and pay for all the machinery, equipment, trade fixtures, appliances and improvements on the leased premises which have been furnished at the expense of said C. J. Devlin, (and not provided for in Article XVIII hereof), at an appraised value to be agreed on, or determined by arbitration, and, in case said Coal Companies shall not desire to purchase said articles, they may give said C. J. Devlin written notice to that effect and said C. J. Devlin shall have the right for ninety (90) days after the receipt of said notice; or, in case no notice is given, he shall have the right to remove all such property from said premises, doing so, however, in a manner which will not interfere with the mining operations of the property hereby demised.

C. J. D.'s right to remove improvements.

## ARTICLE XXI.

Failure to pay rental or royalty.

If said C. J. Devlin shall fail to pay the rental or royalties herein reserved, or any part thereof, on the day when the same become due and payable under the provisions hereof, and shall continue in such default for thirty (30) days, or if default shall be made by him in any of his covenants and agreements herein contained, it shall and may be lawful for said Coal Companies, their attorneys, agents or assigns, at their election, to declare the term herein provided for ended, and into the said demised premises, or any part thereof, either with or without process of law, to re-enter, and the said C. J. Devlin, or any other person or persons occupying, in, or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy, as their first and former estate; and to distrain for any rent, royalty or other sum that may be due hereunder, upon any property belonging to the said C. J. Devlin, whether the same be exempt from execution and distress by law or not, and said C. J. Devlin in that case hereby waives all legal rights which he now has, or may have, to hold or retain any such property under any exemption laws now in force in this state, or in any other way, meaning and intending hereby to give to the said Coal Companies, their successors and assigns, attorneys or agents, a valid and first lien upon any and all the goods, chattels or other property belonging to said C. J. Devlin, which said C. J. Devlin may place upon the demised premises, as security for the payment of said rentals, royalties and other sums in the manner aforesaid, anything hereinbefore contained to the contrary notwithstanding, and at the end of the term herein provided, or sooner in case of termination as provided in Article XVII hereof; or, in case said C. J. Devlin shall fail to promptly and properly keep and perform each and every one of his covenants, undertakings and agreements herein provided for, the said C. J. Devlin covenants and agrees to surrender and deliver up said demised premises and property, peaceably to the said Coal Companies, their successors, attorneys, agents or assigns, immediately upon such termination of said term; and if said C. J. Devlin shall remain in possession of the same after notice of such default, or after the termination of this lease, in any of the ways above named, or as fixed herein, he shall be deemed guilty of a forcible detainer of the premises under the statute, and shall be subject to all the conditions and provisions hereof, and to eviction and removal, forcible or otherwise, with or without process of law, as above stated.

Distrain for rent, etc.

Waiver.

## ARTICLE XXII.

C. J. D. to sell coal to Rly. Co. in Kansas.

SAID C. J. Devlin shall sell and deliver to the Railway Company, on its cars at the mines (except in case of accidents, strikes or causes beyond his control) and the Railway Company shall purchase, in such quantities as are required daily, all the coal required by it in the operation of the lines of railway in Kansas, as far west as and including Newton, which it may own, control or operate, and such portion of its supply from Kinsley to Newton, including Kinsley and tributary branches, as it may from time to time elect, PROVIDED, that the supply for Atchison, and Leavenworth, may be bought from other parties than said C. J. Devlin, at the election of the Railway Company, and PROVIDED, FURTHER, that the coal supply herein contracted for

Atchison and Leavenworth supply may be bought from other parties.

may be increased to an amount of not over 50,000 tons per year for use on lines other than those described in this article, if owned, leased, controlled or operated by the Railway Company. All coal so taken by the Railway Company shall be upon the following terms and conditions:

Quality. 1. That lump coal so furnished shall be screened lump coal, as free from slack, slate and other impurities, as the nature of the coal will permit, by the use of the usual appliances for screening and preparation.

Inspection. 2. That the Railway Company shall have the right to inspect the coal at the mines and may reject any which is not screened and prepared as above specified.

Price. 3. That the Railway Company shall pay to said C. J. Devlin on or before the 15th day of each month, for all coal so delivered during the preceding calendar month, per ton of 2,000 pounds, track scale weights at the mine, as follows:

Osage mine run. (*a*) One dollar and forty-nine cents ($1.49) per ton, mine run coal in the Osage District.

Cherokee; screened lump. (*b*) One dollar and fourteen cents ($1.14) per ton screened lump in the Cherokee District.

Mine run. (*c*) Eighty-nine cents ($.89) per ton mine run coal in the Cherokee District.

Slack. (*d*) Twenty cents ($.20) per ton, slack coal, in the Cherokee District.

Lump and nut mixed. (*e*) One dollar and six cents ($1.06) per ton for lump and nut coal mixed, in the Cherokee District.

Right of Rly. to inspect scales. 4. That the Railway Company shall have the right at all reasonable times, to examine the track scales and to inspect the books and papers pertaining to the weighing of the coal.

When Rly. Co. shall pay trackage or switching charges. 5. That in the event of accident or strike at the Cherokee & Pittsburg Coal & Mining Co.'s mines, which prevents said C. J. Devlin supplying coal from that mine, or if the Railway Company shall elect to take all or any part of its coal supply from other mines controlled by said C. J. Devlin, then the Railway Company shall itself pay the trackage or switching charge on such coal.

Change of price to Rly. when mining price is advanced or reduced. 6. That if C. J. Devlin is obliged to pay an advance in the prices now paid to miners for mining coal, which are

| | | |
|---|---|---|
| Osage City, | yearly, | $1.25 per ton. |
| Peterton, | " | 1.21 " |
| Scranton, | " | 1.03 " |
| Frontenac, | summer, | .87½ " |
| " | winter, | .95 " |

then the price to be paid by the Railway Company shall be increased to the extent of such advance in mining prices, and in the event of a reduction in the mining prices, the price to be paid by the Railway Company shall be reduced to the extent of such reduction in mining price, PROVIDED, that if coal shall be mined at any mine or place other than those above mentioned, then said coal shall, within the meaning of this article, be treated in precisely the same manner as if mined at that mine or place above mentioned, to which it is nearest in location.

C. J. D. shall furnish coal to other portions of line. 7. That in case the railway company shall elect within one year after October 1, 1896, to take its supply of coal for any other portion of its lines during the balance of the term hereof from the mines hereby leased, said C. J. Devlin shall furnish such coal at the same price as hereinbefore provided, upon receiving at least ninety (90) days notice of the approximate quantity of coal required daily

## ARTICLE XXIII.

C. J. D. to ship coal over Rly. lines. As far as practicable, all shipments of commercial coal from the property hereby leased, to competitive railway points, shall be made over the Railway Company's lines, unless other lines make freight rates which the Railway Company is not willing to meet, in which case the shipments may go over the line making such rate while it exists, and said C. J. Devlin shall in good faith and without evasion, use his best endeavors to sell coal from said leased mines in territory which can be reached over the Railway Company's lines, and to increase the coal traffic on said lines, and shall assume all rates and contracts made by the Coal Companies for the sale of coal that may be in effect October 1st, 1896.

C. J. D. to assume Coal Cos.' contracts for coal.

C. J. D. to ship mdse. over Rly. lines.

He shall, as far as practicable, ship all merchandise for his stores, operated at or near the mines on the demised premises, over the lines of the Railway Company, during such time as the Railway Company shall make as low rates of freight thereon as can be obtained over any competing line.

## ARTICLE XXIV.

C. J. D. to assume all Coal Cos.' agreements.

During the term hereof said C. J. Devlin shall assume and fully and faithfully carry out and perform all agreements now in existence and to which said Coal Companies, or either of them, may be a party.

## ARTICLE XXV.

Rly. Co. to construct spurs, etc.

Said Railway Company shall construct, at its own expense, and without unreasonable delay, the necessary spur or branch lines to any mines hereafter opened and operated by said C. J. Devlin on the lands hereby leased and the necessary side tracks to said mines, and make any extensions of side tracks which may be necessary at the mines now opened on said lands, and keep all of the aforesaid tracks in repair, free of expense to said C. J. Devlin.

## ARTICLE XXVI.

Agents' agreements.

That wherever it is provided herein that agents of the respective parties shall act in conjunction, the agreement of such agents shall be deemed the agreement of their principals.

## ARTICLE XXVII.

Arbitration.

Any matter which, according to the provisions hereof may be arbitrated, shall be determined in the following manner

The complaining party shall notify, in writing, the one alleged to be in default, specifying the defaults and the things required to be done, and the name, residence and occupation of the person selected by it as arbitrator, and within ten (10) days after the receipt of such notice, the responding party shall notify, in writing, the complaining party of the name, residence and occupation of the person selected by it as arbitrator, and the two so selected shall proceed to choose a third like disinterested person, and they three shall, as speedily as the case will allow, proceed to determine the matter in dispute. In case the respondent shall fail, to select a person and notify the complainant within the time as aforesaid, then the person selected by the complainant shall at once select one other disinterested person and they two shall select a third disinterested person and they three shall constitute the arbitrators. In case said two arbitrators selected by the parties in interest respectively shall fail to agree upon a man, then said third arbitrator shall be appointed by the Judge for the time being of the District Court of the United States for the state of Kansas. The decision, in writing, signed by any two arbitrators, appointed and selected as aforesaid, shall be final, conclusive and binding on all concerned.

## ARTICLE XXVIII.

C. J. D. not to assign without consent of other parties to this agreement.

Neither this lease and agreement, nor any interest therein, shall be assigned by the said C. J. Devlin without the consent of the Coal Companies and of the Railway Company, given in writing by their respective Presidents.

In Witness Whereof, The parties of the first part have caused these presents to be executed by their respective Presidents, duly attested by their respective Secretaries; the party of the second part has hereunto set his hand and seal and the party of the third part has caused these presents to be executed by its President, duly attested by its Secretary, the day and year first above written.

THE OSAGE CARBON COMPANY,

[seal.] By

Attest: ALDACE F. WALKER, *President.*

E. WILDER, *Secretary.*,

CHEROKEE & PITTSBURG COAL & MINING COMPANY,

By

[SEAL.]

ALDACE F. WALKER, *President.*

Attest:

E. WILDER, *Secretary.*

CHARLES J. DEVLIN. [SEAL.]

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

By

[SEAL.]

E. P. RIPLEY, *President.*

Attest:

E. WILDER, *Secretary.*

Approved as to form:

VICTOR MORAWETZ,

*Gen. Counsel.*

Exhibit "B."

61 In consideration of the payment of one dollar ($1.00) receipt of which is hereby acknowledged, and of other valuable considerations, I, Chas. J. Devlin, the Lessee named in the attached lease from The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company, bearing Secretary's No. 10886 and dated October 1st, 1896, do hereby assign and transfer the said attached lease, and all my rights, title and interest thereunder to the Mount Carmel Coal Company, a corporation organized under the laws of the State of West Virginia; this assignment being made subject to the approval of The Osage Carbon Company; the Cherokee & Pittsburg Coal & Mining Company and The Atchison, Topeka, & Santa Fe Railway Company, parties to said lease.

Dated this first day of March, 1897.

(Sgd) CHAS. J. DEVLIN.

State of Kansas,
County of Shawnee.—ss.

Before me, a Notary Public, in and for the County and State aforesaid, this day, personally came Chas. J. Devlin, who is personally known to me to be the same person who executed the above instrument and he duly acknowledged the execution of the same.

In testimony whereof, I have hereunto set my hand and official seal this Fifth day of May, A. D. 1897.

(Sgd) FRANCIS C. DOWNEY.
Seal of Notary Public Notary Public.
My Commission expires Jan. 6, 1899.

62 Exhibit "C."

This Agreement, made this first day of June, 1898, between the Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, hereinafter called the Coal Companies, parties of the first part, Mount Carmel Coal Company, party of the second part, and The Atchison, Topeka & Santa Fe Railway Company, hereinafter called the Railway Company, party of the third part. Witnesseth That:

Whereas, heretofore, upon the first day of October, 1896, a certain agreement was entered into between the said Coal Companies, as parties of the first part, Charles J. Devlin, as party of the second part, and the Railway Company, as party of the third part, for the leasing and working, for the term of three years from the date of said agreement, of the coal properties of the said Coal Companies situated in the Counties of Osage

and Crawford in the State of Kansas, and the supplying of said Railway Company with coal, as well as for other things in said agreement mentioned; and

Whereas, afterwards, on or about the first day of March, 1897, the said Charles J. Devlin duly assigned and transferred all of his right and interest in and under said lease and agreement to said Mount Carmel Coal Company, which said last named Coal Company, on or about April 10th, 1897, duly accepted said assignment and assumed said lease and agreement and undertook to perform all the covenants of the said Charles
63 J. Devlin, therein, which said assignment to and substitution to said Mount Carmel Coal Company in the place and stead of said said C. J. Devlin, was assented to by the other parties to said agreement; and

Whereas it is the desire of the parties hereto that the said lease of said Coal Companies and the terms and provisions of said agreement dated said first day of October, 1896, be extended for the term and period of five years from the date hereof upon the same terms, provisions and covenants as in said agreement of October 1st, 1896, contained and set forth, except as in this agreement changed and modified;

Now, Therefore, in consideration of the premises and of the covenants of each party hereto, it is mutually covenanted and agreed by and between the parties hereto as follows:

The said lease of the coal properties and said agreement dated October 1st, 1896, shall be extended and continued in force and operation in favor of said Mount Carmel Coal Company and of the other parties hereto for the term and period of five years from the date of this agreement, upon and subject, however, to all the terms, covenants and provisions in said agreement of October 1st, 1896, contained, except as specifically modified by the provisions hereinafter specially set forth; and except as herein modified all of the covenants of the Coal Companies, binding upon them respectively in the said agreement of October 1st, 1896, shall be binding upon them respectively and be applicable to this extension of said lease and agreement; and all the covenants in said lease and agreement of October 1st, 1896, binding upon said Charles J. Devlin and assumed by said Mount Carmel Coal Company
64 as hereinbefore stated, shall be binding upon the said Mount Carmel Coal Company and be applicable to this extension of said lease and agreement; and all the covenants binding upon said Railway Company in said agreement of October 1st, 1896, shall be binding upon it and applicable also to this extension of said lease and agreement during the same; and, generally, except as herein modified, the terms and provisions of said agreement of October 1st, 1896, shall be bind-

ing upon the respective parties hereto as in said agreement for a period of five years from the date hereof, unless sooner terminated in the manner provided for in said lease and agreement of October 1st, 1906, and with the same force and effect as if the said Mount Carmel Coal Company were substituted in the name, place and stead of said C. J. Devlin therein and as if the term therein provided, instead of running for the period of three years from the first day of October 1906, should be designated and determined as running for the period of five years from the first day of June, 1898.

The party of the second part covenants and agrees to and with the Cherokee & Pittsburg Coal & Mining Company that, as expeditiously as practicable, and at its own sole cost and expense, it will sink and open up in a good and workmanlike manner a new mine upon the southwest quarter (1-4) of section five (5), Township twenty-nine (29) South, Range twenty-five (25) in Crawford County, being a part of the premises demised by said Cherokee & Pittsburg Coal & Mining Company and shall work and operate the same under and subjectto the terms and provisions applicable to similar mines.

65 It is further covenanted and agreed that the rental payable by said Mount Carmel Coal Company to said Cherokee & Pittsburg Coal & Mining Company during the term of this agreement shall be increased from the sum of One Hundred and Fifty Dollars ($150.) per month to the sum of Two Hundred Dollars ($200.) per month, shall be payable during the term of this lease and agreement by the said Mount Carmel Coal Company to the said Cherokee & Pittsburg Coal & Mining Company.

All balances which may be or become due from the Coal Companies to said Mount Carmel Coal Company for construction work on mines heretofore opened and worked under said agreement of October 1st, 1896, shall be extended and shall not become payable until the expiration of this agreement.

At the expiration or termination of this agreement, all of the machinery and fixed appliances which may be used at the time in or about any of the mines opened after the date hereof and worked by said second party upon the property of the Coal Companies leased to it shall forthwith belong to and become, without cost or charge therefor, the property of the Coal Company respectively upon whose lands said machinery or fixed appliances may at the time be used, it being understood, however, that mules, harness, pit cars, hand tools and supplies in the mine storehouse are not to be considered fixed equipment of appliances, but shall remain the property of the Mount Carmel Coal Company.

In case the party of the second part should open up or operate new mines upon property other than that leased by the Coal Companies, as hereinbefore referred to, then preference shall at all times be given for the purpose of supplying commercial business to coal from the mines upon the properties of the Coal Companies so leased, it being understood that mines upon the properties of the Coal Companies so leased shall be worked to their full capacity and coal therefrom shall be first used for the purpose of supplying the commercial business and the Railway Company. No coal for the supply of the Railway Company shall be taken or furnished from such new mines located upon other lands than those leased by the Coal Companies, without the consent of the Railway Company. Should coal be taken or furnished from such new mines upon other property than that leased by the Coal Companies, without the consent of the Railway Company, then, at the option of the Coal Companies, said Mount Carmel Coal Company shall account for the same to the Coal Companies and pay the same royalties thereon as though such coal had been taken from lands leased by the Coal Companies.

66

The party of the second part shall, upon the execution of this agreement, give a good and sufficient bond in the penal sum of One Hundred Thousand Dollars ($100,000.) for the full and faithful performance of its covenants and agreements, which bond shall be signed by at least three sureties, each of whom shall be satisfactory to the President and Treasurer of the Railway Company.

Said party of the second part shall, during the term of this lease and agreement, in addition to the rental and royalties payable, also pay annually as further rental to the Coal Companies a further sum of money, which sum is to be determined upon the thirty-first day of May of each year, during the term of this agreement, beginning with the thirty-first day of May, 1898, and ascertained as follows: From the gross receipts derived by the said party of the second part from the sale of all coal and the working or operation of the mines upon the lands leased by the Coal Companies during the year preceding said thirty-first day of May, there shall be deducted the expenses and disbursements of said party of the second part during such year in carrying on the operation of and in working said mines upon the lands so leased by the Coal Companies, but such expenses shall not include any salaries of any officers of the party of the second part, except those now paid and which consist of salaries of the Secretary and bookkeepers, and a list of which salaries shall be furnished to the Auditor of the Coal Companies within thirty days from

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the date of this agreement, and except also salaries of officials actually engaged at the mines. Neither shall such expenses include the cost or expense of construction or opening up of new mines or extensions thereof. From the balance so ascertained, there shall be deducted the sum of Twenty-Five Thousand Dollars ($25,000.) and one-half of the balance then remaining shall be determined as the sum payable as a further annual rental for the year preceding, and the same shall be payable within thirty days after the thirty-first day of May in each year, but this provision shall not be construed as creating a partnership between the Coal Companies and the said Mount Carmel Coal Company, nor as giving authority to direct the mode and manner in which the business of said Mount Carmel Coal Company shall be conducted, nor as giving said Mount Carmel Coal Company authority to act for or bind the said Coal Companies; but said Coal Companies shall, never-
68 theless, have and retain all the rights, powers and privileges granted to or reserved by them and set forth in said agreement of October 1st, 1896.

Said Mount Carmel Coal Company, its successors or assigns, shall not do or suffer anything to be done which may make the said Coal Companies liable for its acts, debts or obligations; and said Mount Carmel Coal Company, its successors and assigns, shall indemnify and save harmless the said Coal Companies and each of them, their and each of their successors and assigns, and the said Railway Company, its successors and assigns, against any and all liability which may be imposed upon them or any of them, by reason of anything done or suffered or neglected to be performed by said Mount Carmel Coal Company, its successors or assigns, and against any loss, damage, cost or expense which they, said Coal Companies and said Railway Company, or any of them, or the successors or assigns of any of them, may suffer or be put to by reason of or arising out of the acts or omissions of said Mount Carmel Coal Company, its successors or assigns, or the debts or obligations created by the said Mount Carmel Coal Company, its successors or assigns.

It is further agreed and understood that the said lease and agreement dated the first day of October, 1896, shall, from the date hereof, be held and deemed to be extended and modified by this agreement, as hereinbefore provided.

This agreement shall be binding upon the successors and assigns of the party of the second part, and shall be binding upon and run to and insure in favor of the successors and assigns of the first and third parties respectively.

In witness whereof, the parties hereto have caused these presents to be executed in duplicate by their respective
69 Presidents, duly attested by their respective Secretaries and their respective corporate seals to be attached, the day and year first above written.

THE OSAGE CARBON COMPANY.
[Seal] By E. P. Ripley
Its President.

Attest: E. Wilder, Secretary.

CHEROKEE & PITTSBURG COAL & MINING CO.
[Seal] By E. P. Ripley,
Its President.

Attest: E. Wilder, Secretary.

MOUNT CARMEL COAL COMPANY,
[Seal] By Chas. J. Devlin
Its President.

Attest: J. D. Norton, Secretary.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.
[Seal] By E. P. Ripley,
Its President.

Attest: E. Wilder, Secretary.

70 Exhibit "D."

Agreement, made August 30, 1900, between the Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, hereinafter called the "Coal Companies," parties of the first part, the Mount Carmel Coal Company, hereinafter called the "Mount Carmel Company," party of the second part, and the Atchison, Topeka & Santa Fe Railway Company, hereinafter called the "Railway Company," party of the third part.

Whereas, on or about the first day of October, 1896, a certain agreement dated that day was entered into between the Coal Companies, as parties of the first part, Charles J. Devlin, as party of the second part, and the Railway Company as party of the third part, and thereafter, on or about the first day of March, 1897, the said Charles J. Devlin, with the assent of the other parties to said agreement, duly assigned all his right and interest therein to the Mount Carmel Coal Company, and thereafter, on or about the first day of June, 1898, the Coal Companies and the Railway Company entered into a supplemental agreement with the Mount Carmel Company dated that day, extending the time within which said agreement should be and continue in force and effect to June first, 1903, and

Whereas, it is the desire of the parties hereto that said agreement of October first, 1896, and said supplemental agreement of June first, 1898, shall continue in force and effect for a further period of three (3) years from and after the first day of June, 1903, upon the terms, provisions and conditions in said agreement and said supplemental agreement and hereinafter set forth:

71 Now, Therefore, this Indenture Witnesseth: That the parties hereto have mutually covenanted and agreed to and with each other as follows:

First: Said agreement dated October 1, 1896, and said supplemental agreement dated June 1, 1898, shall be, and the same hereby are, extended and continued in full force and effect for a further period of (3) years from and after the first day of June, 1903, and, except as herein provided, all of the covenants of the Coal Companies binding upon them respectively in said agreement of October first, 1896, and said supplemental agreement of June first, 1898, shall be binding upon them respectively and be applicable to this extension of said agreement and said supplemental agreement; and all of the covenants in said agreement of October first, 1896, and in said supplemental agreement of June first, 1898, binding upon said Charles J. Devlin or upon said Mount Carmel Company, shall be binding upon said Mount Carmel Company and be applicable to this extension of said agreement and said supplemental agreement, and generally, except as herein modified, the terms and provisions of said agreement and said supplemental agreement shall be binding upon the respective parties hereto for such extended period, unless sooner terminated in the manner provided for in said agreement of October first, 1896.

Second: The Mount Carmel Company shall, forthwith upon the execution of these presents, and at its own sole cost and expense, sink and open up, in a good and workmanlike manner, a new mine upon the property of the Cherokee & Pittsburg Coal and Mining Company upon such point in Section two (2), Township thirty-one (31 south, Range twenty-four (24) east, Crawford County, Kansas, as in its opinion is
72 most convenient for the practical and economical working of the coal remaining in the surrounding lands of the said Cherokee & Pittsburg Coal and Mining Company, and shall work and operate the same under and subject to the terms and provisions of said agreements and said supplemental agreement, as modified by these presents, applicable to similar mines on the lands of the Cherokee & Pittsburg Coal and Mining Company.

Third: It being the intention of the parties to continue the said contract relations now existing between them until all the coal in the lands of the Cherokee & Pittsburg Coal and Mining Company, situated in the County of Crawford, in the State of Kansas, which are subject to said agreement of October first, 1896, and said supplemental agreement of June first, 1898, and hereto, has been mined, it is expressly understood and agreed that in case, in the opinion of the Coal Companies, all such coal has not been mined on or prior to June first, 1906, the date of the expiration of said agreement and said supplemental agreement as hereby extended, then and in that case, the Coal Companies shall have the right to further extend the period during which said agreement and said supplemental agreement and these presents shall be in force and effect, for a period sufficiently long, in the judgment of the Coal Companies, to insure the complete mining and working out of such coal; provided, however, that in case the Mount Carmel Company shall desire it, the question as to whether at any time all the coal in said lands has been completely mined shall be submitted to arbitration, as provided for in said agreement of October first, 1896.

Fourth: In case at any time, in the judgment of the Cherokee & Pittsburg Coal and Mining Company, the proper and economical operation of the Coal properties leased by the Cherokee and Pittsburg Coal and Mining Company to the Mount Carmel Company requires the sinking of any ad-
73 ditional mine or mines on said lands, such mine or mines shall forthwith, upon request of the Coal Companies to the Mount Carmel Company, be sunk and opened up by the Mount Carmel Company at the sole cost and expense of the Mount Carmel Company, and the same shall be worked and operated by the Mount Carmel Company in all respects as provided for the sinking and operating of the mine described in paragraph Second hereof; provided, that in case the Mount Carmel Company shall so desire, the question as to whether the proper and economical operation of said properties requires the opening of any such additional mine or mines shall be submitted to arbitration, as provided for in said agreement of October first, 1896.

Fifth: At the expiration or termination of this agreement, the Mount Carmel Company shall and will, in case the Cherokee and Pittsburg Coal and Mining Company desires to sell the same, purchase from the Cherokee & Pittsburg Coal and Mining Company, at an appraised value, all such improvements, equipment, machinery, tools, appliances, tenements, mules, harness, pit cars, supplies, and all other personal property used in or appurtenant to mining operations which the

said Cherokee & Pittsburg Coal and Mining Company may own in any of the mines, or upon any of the lands leased by it to the Mount Carmel Company.

All improvements, equipment, machinery, tools, appliances and tenements pertaining to and used in connection with the construction and operation of the mine described in paragraph Second hereof, or any additional mine or mines constructed or operated under paragraph Fourth hereof, shall be furnished at the sole cost and expense of the Mount Carmel Company and shall be and remain the property of the Mount Carmel Company at the expiration of this contract on the first day
74 of June, 1906, or at the expiration of any extension hereof; provided, however, that said Mount Carmel Company shall not be permitted to remove any such improvements, equipment, machinery, tools, appliances or tenements from said mine or mines, unless and until it shall have been determined by agreement or by arbitration as in paragraph Third hereof provided, that all the coal in said mine or mines has been worked out; and provided further, that in case this contract shall be terminated for or on account of the default of said Mount Carmel Company prior to the time when all said coal shall be mined as aforesaid, then and in that case, all such improvements, equipment, machinery, tools, appliances and tenements shall be and become absolutely the property of that coal company upon whose land the same may be at the time of such termination.

Sixth: Upon the termination of this agreement, the Mount Carmel Company shall, within ninety (90) days after written notice shall be given to it by the Coal Companies, remove from the lands of the Coal Companies all machinery, tools, appliances and other personal property and equipment whatsoever owned by it at such time on said lands; and in case the same shall not be removed within such period of ninety (90) days, the same shall thereafter become and be the property of the Coal Companies absolutely.

Seventh: The time of payment of all balances which may be or become due from the Coal Companies to said Mount Carmel Company for construction work on mines heretofore opened and worked under said agreement of October 1, 1896, shall be extended and the said balances shall not become payable until the expiration or termination of this agreement.

Eight: It is expressly understood and agreed that
75 nothing in this agreement or in said agreements of October first, 1896, and June first, 1898, or either of them, contained shall be construed as giving the Mount Carmel Company any right to mine any coal from any lands, the title to which or any interest in which may be acquired by the

Coal Companies or the Railway Company or either of them subsequent to August 30, 1900.

Ninth: The Mount Carmel Company shall, upon the execution of this agreement, give a good and sufficient bond in the sum of one hundred thousand dollars ($100,000) for the full and faithful performance of its covenants and agreements under said agreement of October first, 1896, and said supplemental agreement of June first, 1898, and these presents, which bond shall be signed by at least three sureties, each of whom shall be satisfactory to the President and Treasurer of the Railway Company, and upon the execution and delivery of said bond, the Coal Companies and the Railway Company shall cancel, surrender and deliver to the Mount Carmel Company any bond heretofore executed by it or by said Charles J. Devlin in that behalf.

Tenth: This agreement shall be binding upon the successors and assigns of the Mount Carmel Company, and shall be binding upon and run to and insure in favor of the successors and assigns of the Coal Companies and the Railway Company, respectively.

In witness whereof, the parties hereto have caused these presents to be executed in duplicate by their respective officers thereunto duly authorized, the day and year first above written.

THE OSAGE CARBON COMPANY.

(Seal.) By E. P. Ripley,
Its President.

Attest: C. L. Deming,
Asst. Secretary.

CHEROKEE & PITTSBURG COAL
76 AND MINING COMPANY,

(Seal.) By E. P. Ripley,
Its President.

Attest: C. L. Deming,
Asst. Secretary.

MOUNT CARMEL COAL COMPANY,

(Seal.) By Charles J. Devlin,
Its President.

Attest: J. G. NORTON,
Its Secretary.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

(Seal.) By E. P. Ripley,
Its President.

Attest: C. L. Deming,
Asst. Secretary.

77

## Exhibit "E."

### Partial Report of Account with Receivers Hurley, Leland & Reeves,

Including only items of Mount Carmel Coal Co., prior to receivership.

Debits.

| | | | |
|---|---|---|---|
| July 29. | The Mount Carmel Coal Co. in settlement of balance against them for the month of April which was due May the 15th 1905, gave two drafts on the Kansas City Coal & Coke Co., dated June 1st, 1905. The first, $10,000; 18 days due June 19th was paid. The second, $14,063.16, 23 days, due June 24th and carrying the interest on both drafts was, upon verbal guarantee that payment would be made on July 1st, extended to that date, at which time draft was protested | | $14,063.16 |
| | On May 23rd, 1905, advance with interest was made on account of July voucher, which advance was made to aid in meeting pay-rolls; the pay-days being the second and fourth Saturdays of each month, the Second pay-day of May would fall on May 27th, | $20,280.00 | |
| | On July 3rd, 1905, advance with interest, was made on account of July voucher, which advance was to assist in meeting pay-rolls due June 24th. This payment was promised by E. Wilder, Treasurer, prior to the collapse of C. J. Devlin's affairs, and was to enable him to arrange funds at the American National Bank, of Kansas City, for pay-roll purposes. Anticipating the payment of a note dated May 15th, for $33,000.00, falling due Aug. 15th which payment was promised and made July 3rd, | 33,247.50 | |
| | | 53,527.50 | |

| | | | | |
|---|---|---|---|---|
| | Cr. Voucher 69-13 coal July 1st to 7th | $17,934.79 | | |
| | Refund of double credit on Bill No. 10875 | 15.50 | | |
| | | $17,950.29 | | |
| | Less debit balance on June 1905 account | 17,301.80 | 648.49 | |
| | Amount transferred to receiver's account as Mount Carmel Coal Co. balance July 7th, | | | 52,879.01 |
| Aug. 7. | Bill No. 471-0 against Mount Carmel Coal Co. to cover duplicate payment of coal in car No.-72658, 2600 lbs. at $1.75, Sept. | | | |
| 78 | 19th, 1904, and Nov. 9th, 1904 | | | 4.90 |
| | | | | $66,947.07 |

Credits.

| | | | |
|---|---|---|---|
| Aug. 3. | To cancel a part of debit July 18, 1905 of $14,063.16, being amount of fee charged by bank in an endeavor to collect draft of C. J. Devlin, June 1st, 1905, on Kansas City Coal & Coke Co. of $14,060.66 | $ 2.50 | |
| 4. | Ticket redemption draft No.-51751, favor of Mount Carmel Coal Co. | 62.50 | |
| 9. | Voucher No. 1975-13, Invoices March, May, June, July 1st to 6th inc. | 1,426.60 | |
| 11 | Ticket redemption draft No.-46516 issued to C. J. Devlin Dec. 14th, just found among C. J. Devlin papers, | 2.00 | |
| 17 | Voucher No. 2443-13, Invoice June to July 7th, | 568.48 | |
| 17 | Voucher 3305-13, Invoice July 3rd | 194.13 | |
| 19 | Pecos Valley & Northeastern Voucher No. 172-16, Invoice June 20th, | 14.32 | |

| | | |
|---|---|---|
| 19 | Voucher No. 3311-13, Invoice June | 3,294.49 |
| 25 | Account of express charges included in June 30th, 1905, settlement with Mount Carmel Coal Co., and again collected on certified statement from that Company July 10th, 1905, resulting in over collection | 4.45 |
| Sept. 16 | Voucher No. 2876-13, Invoice Feb. to July 7th | 4,000.33 |
| 16 | Voucher No. 3388-13, Invoice Feb. June, July 7th, | 44.12 |
| 27 | Pecos Valley & Northeastern vouchers, Invoice April & June, | 28.99 |
| | | $ 9,642.91 |
| | Balance still due as far as known, Sept. 27 | 57,304,16 |
| | | $66,947.07 |

79 In the District Court of the United States
for the District of Kansas,
First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Stipulation

It is hereby agreed that the intervening petition of the Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, a copy of which was served on the receivers herein on the first day of November, 1905, may be filed in the above entitled court on November 20, 1905, and will be treated by the receivers of said bankrupt in all respects as if leave of the Court had been obtained for the filing thereof, the said receivers to have up to and until December 10th, 1905, to answer or plead to said petition.

CLIFFORD HISTED,
Attorneys for Receivers.

WM. R. SMITH,
O. J. WOOD,
Attorneys for Petitioner.

In the District Court of the United States
80 for the District of Kansas
First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

In Re: Petition of Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Compay, et al.,

Demurrer of Receivers.

Now come James E. Hurley, Cyrus Leland, Jr. and Walter Reeves, Receivers, and demur to the petition of the Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and The Cherokee and Pittsburg Coal & Mining Company, filed herein, for the reason that the said petition does not show any grounds for relief in favor of the said Petitioners or either for them, of the nature and kind in said petition demanded.

CLIFFORD HISTED.
Attorneys for Receivers.

In the District Court of the United States
81 for the District of Kansas
First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

In Re: Petition of Atchison, Topeka and Santa Fe Railroad Company et al.,

Answer of Trustees.

Now come James E. Hurley, Cyrus Leland Jr., and Walter Reeves, Trustees, and for answer to the petition of the Atchison, Topeka and Santa Fe Railroad Company, the Osage Carbon Company and the Cherokee and Pittsburg Coal & Mining Company deny each and every, all and singular the allegations and averments in said petition contained.

CLIFFORD HISTED,
Attorney for the Trustees.

In the District Court of the United States
82 for the District of Kansas
First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

In Re: Petition of Atchison, Topeka and Santa Fe Railroad Company et al.,

Amended Answer of Trustees.

Now come James E. Hurley, Cyrus Leland Jr., and Walter Reeves, Trustees, and for answer to the petition of the Atchison, Topeka and Santa Fe Railroad Company, the Osage Carbon Company and the Cherokee and Pittsburg Coal & Mining Company deny each and every, all and singular the allegations and averments in said petition contained.

And these Trustees further answering deny that the said pretended verbal contract set forth in said petition was a modification of the leases in writing, copies whereof are attached to said petition; but, on the contrary, aver that the said verbal contract, if made at all, was an entirely independent contract.

And further aver that said pretended verbal contract as a modification of the said written contracts would be within the statute of frauds of the State of Kansas and void.

CLIFFORD HISTED,
Attorneys for Trustees.

Before N. H. Loomis, Referee.

84 In the matter of the Mount Carmel Coal Company.

Transcript of testimony taken in the matter of the Mount Carmel Coal Company, before N. H. Loomis, Referee, January, 13, 1906.

Appearances: W. R. Smith, Attorney for the A. T. & S. F. Ry. Co. Clifford Histed, Attorney for Mt. Carmel Coal Company.

Judge Smith: It is agreed that inasmuch as this petition was filed when the Receivers were in possession of the properties mentioned in the petition, the amendment may be filed asking the same relief against the Trustees, they having succeeded themselves, but are now denominated Trustees, and we will file that amendment.

As I understand Mr. Histed, you admit these are copies of the original contracts marked exhibits "A" to "F" are true copies of the original contracts and extensions?

Mr. Histed: Yes.

A. O. Wellman, a witness called on behalf of The Atchison, Topeka, and Santa Fe Railway company, being duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Smith:

Q. What is your name, Mr. Wellman? A. A. O. Wellman.

Q. What position do you occupy with The Atchison, Topeka and Santa Fe Railway Company?

A. At the present time Assistant Treasurer.

Q. Well in May, June and July of last year?

85 A. I was book-keeper in charge of accounts.

Q. At the time you were book-keeper in charge of accounts who was the Treasurer of the Company in charge of the Treasury Department here? A. Edward Wilder.

Q. He is now dead is he? A. He is.

Q. Now, did you have charge of accounts between The Mount Carmel Coal Company and the Atchison, Topeka and Santa Fe Railway Company in April and May, 1905? A. I did.

Q. And in June? A. I did.

Q. And in July? A. I did.

Q. Did you meet Mr. Devlin frequently about that time? A. Very frequently.

Q. I wish you would look at this exhibit here marked "Exhibit E" attached to the petition. (Hands witness a paper) There is an itemized bill there against the Mount Carmel Coal Company of fifty odd thousand dollars, advances made. You may state for what purpose those advances were made; first to whom they were made and for what purpose.

A. They were made to C. J. Devlin, for the purpose of meeting his pay rolls.

Q. Payrolls where? A. Mount Carmel Mines.

Q. Do you know how much, at that time, his payrolls were a month?

A. I presume they varied, but the estimated amounts were at $80,000.00. He paid twice a month, Mount Carmel, I believe on the second and fourth Saturdays of the month, about forty odd thousand each pay roll.

Q. Each two weeks?

A. $80,000.00 all together, that is approximately.

Q. During the time mentioned in that bill were these Mount Carmel mines in active operation? A. They were.

Q. Do you know how many employes they had down there?

A. I have no means of knowing.

Q. What position did Mr. Devlin hold in the Mount

86 Carmel Coal Comdany during these times?

A. I understood him to be manager and owner.

Q. President? A. President I think was the title.

Q. Now you may state just how these transactions arose, and what the conversation was between you or Mr. Wilder in the presence of Mr. Devlin.

Mr. Histed: It is admitted that Mr. Devlin is dead?

Mr. Smith: Yes, I will have to, I can't dispute that.

Mr. Histed: We object to any testimony by Mr. Wellman, representing The Atchison, Topeka and Santa Fe Railway Company, with Mr. Devlin representing the Mount Carmel Coal Company, because under the Statute Mr. Wellman is an incompetent witness to testify in such conversation.

Mr. Loomis: I will reserve my ruling. The testimony may go into the record.

Mr. Histed: I would like to have the witness fix the time and the transaction.

Mr. Smith: This is a general statement, and you can take them up as they come along.

Q. State what was said from time to time by Mr. Devlin at the time these advances were made, with respect to their use in satisfying the laborers at the Mount Carmel Mines.
A. What was said to me, or in my presence?
Q. In your presence.

Mr. Histed: It is understood that this testimony is objected to, Mr. Wellman being an incompetent witness.

Mr. Loomis: Yes.

87 A. It was the custom of Mr. Devlin to ask advances.

Mr. Histed: We object to what the custom of Mr. Devlin was.

Mr. Smith: Never mind about the custom. State what was said at the different times. A. He asked for advances for pay roll purposes.
Q. Well were those advances made from time to time by Mr. Wilder as Treasurer, in response to his request?
A. They were in response to his request.
Q. How did he agree to satisfy those advances? A. With voucher for coal.
Q. What do you mean by vouchers for coal? A. His voucher represents the amount of coal furnished the Company from month to month.
Q. In other words he was to furnish coal? A. He was to furnish coal to satisfy them.
Q. How soon was he to furnish that coal after these amounts were advanced?

Counsel for the Mt. Carmel Coal Co. objected to the question as being indefinite and calling for conclusion.

Q. How soon after advances were made did he say he would furnish the coal? What did he say to Mr. Wilder at the time, he would furnish the coal.

A. He was to furnish coal until the advances were satisfied.

Mr. Histed: We object to the answer as being statement of the conclusion of the witness. The referee sustained the objection.

Q. State, what was said about when he would satisfy these advances, by delivery of coal?

Mr. Histed: I insist the witness should be limited by time and place. Objection overruled.

88 Q. Look at that bill. There is an item of fourteen thousand dollars advanced, the first item; when was that advance? Approximate it if you can't give the exact date.

A. I can't give the exact date because this fourteen thousand dollars represents coal that Mr. Devlin didn't furnish in his voucher, which was due May 15.

Q. Due to you May 15? A. Due to us May 15? He was to furnish it at some subsequent date to that.

Q. That was after that fourteen thousand dollars advance?

A. That was after that fourteen thousand dollars was advanced.

Q. What is the next item below that? A. Next item is $20,280.00.

Q. When was that money advanced to him?

A. May 23, 1905; advance with interest was made on account of July voucher, which advance was made to aid in meeting payrolls, the pay days being the second and fourth Saturdays each month; the second pay day of May would fall on May 27th. This advance was made May 23.

Q. Was the advance made after the arrangement with Devlin that he would furnish coal?

Mr. Histed: We object to the question as calling for a conclusion. Objection sustained.

Q. Do you remember the transaction of that advance?

A. I do.

Q. State at whose solicitation it was made, if anybody's, and if anything was said about it.

Mr. Histed: We object to the question; which objection was overruled by the Referee.

A. At request of C. J. Devlin.

Q. Take the next item. A. On July 3, the next item is $33,247.50, on July 3, advance with interest was made on account of July voucher, which advance was to assist in meeting

payrolls due July 24. This payment was promised by
89 E. Wilder, Treasurer, prior to the collapse of C. J. Devlin's affairs, and was to arrange with the American National Bank at Kansas City for payroll purposes.

Q. I wish you would explain that transaction.

A. Mr. Devlin arranged for his pay roll purposes through the American National Bank at Kansas City, and in doing so gave an obligation and he gave an order against his coal voucher, which order was brought to us and filed.

Q. Gave an order on the American National Bank, Kansas City? A. Gave an order on the American National Bank, Kansas City.

Q. For how much? A. 33,000.00, the 247.50 being interest, because we anticipated that — before this was due, it didn't fall due until August 15, Mr. Devlin represented to us that it was absolutely necessary to meet his pay rolls, otherwise there would be serious trouble, and we agreed to take up this note in order that he might arrange with the bank for his funds; that is to say, we paid him money for pay roll purposes, and we so agreed with the bank; that is, Mr. Wilder agreed to do it.

Q. Is that the last item there? A. That is the last item there, yes sir.

Q. What does that aggregate, those advances made? A. It aggregates $66,947.07.

Q. You have credited the Mount Carmel Coal Company with the amounts there? A. Yes sir.

Q. How do these credits come? A. From his vouchers for coal. There are one or two discrepancies here on account of bills that were overcharged, or something of that nature.

Q. This is substantially correct. A. Yes sir, this is correct.

Q. The debit. A. The debit is correct, yes sir. I thought you were talking about the credit.

90 Q. The amount stated for advances made is substantially correct? A. Yes sir.

Q. Who did Mr. Devlin apply to when he wanted these advances made, what officer of the Atchison, Topeka and Santa Fe Railway Company?

A. He applied to the Treasurer, Mr. Wilder. In his absence he applied to me.

Q. Mr. Wilder was present, was he not, during some of the months covered by those advancements. A. He was.

Q. During what period of that time? A. About June 2, I think Mr. Wilder returned.

Q. During the year 1905 he was absent up to June 2?

A. About June 2.

Q. Then after that he was in the office was he? A. Mr. Wilder was in the office most of the time, and at his home.

Q. After that when Mr. Devlin came to the office to make negotiations for advances, were those negotiations made in your presence, with Mr. Wilder? (No answer.)

Q. Say during the time mentioned, during the year 1905, was the Mount Carmel Coal Company furnishing coal monthly to The Atchison Topeka & Santa Fe Railway Company under these contracts stated in this petition? A. They were, yes sir.

Q. What was the practice of the Treasurer's office in the matter of paying the Mount Carmel Coal Company for coal; how was it paid?

Mr. Histed: We object to the question as being incompetent.

Objection overruled.

Q. You have mentioned vouchers here. Explain how they were made. A. The invoices for coal were sent to the Purchasing Agent for the current month.

Q. That is the Mount Carmel Coal Company would
91 send them to the Purchasing Agent? A. The Mount Carmel Coal Company would send them to the Purchasing Agent for voucher.

Q. These invoices show how much coal was delivered to The Atchison, Topeka and Santa Fe Railway Company. A. For the current month. The purchasing Agent would voucher covering invoices in his hands. By agreement the settlement was on the 15th day of the succeeding month. If there was any balance due Mr. Devlin we paid him. If there was any balance due us we charged it up against his next month's voucher for coal.

Q. Now you have received a good deal of coal since—There ain't any dispute about the Receivers and Trustees, receivers first and trustees later, having furnished The Atchison, Topeka & Santa Fe Railway Company with coal sufficient to put in a claim, if it should be charged we had one?

Mr. Histed: We say the Receivers are constantly selling the Santa Fe coal and have been ever since they were qualified.

Mr. Smith: In large amounts?

Mr. Histed: Oh yes. It is not admitted that we furnished it under the contract set up in this petition.

Mr. Smith: Of course not. You will agree the receivers furnished the Santa Fe Railroad with coal to the amount of fifty, sixty, or seventy-five thousand dollars a month?

Mr. Histed: I guess it is that much—more than that.

Cross-Examination.

Questions by Mr. Histed:

Q. Mr. Devlin was connected with several other operating coal companies was he not, Mr. Wellman? A. He was.

Q. He was President of a number of others was he
92 not. A. He was.

Q. Those companies were also selling coal to the Santa Fe Railway Company during this same time? A. They were.

Q. Now, do you fix in your mind, any particular transaction that was brought vividly before your recollection, or are you talking with reference to what your general understanding of some general custom may have been? A. I can fix any certain item you choose.

Q. In your testimony with reference to these conversations you have had with Mr. Devlin—in your testimony to Judge Smith did you have in your mind any particular time in which you said you had any conversation with Mr. Devlin? A. I understood the question was general, and the conversation general.

Q. You were testifying in general? A. When he asked me for any specific item I would testify to that one item.

Q. As a matter of fact it was not a novel thing for the Santa Fe Railway to loan Mr. Devlin money, which he was supposed to subsequently pay by furnishing coal? A. We only furnished him money for pay roll purposes.

Q. That was the practice indulged in by your office for considerable length of time? A. Almost every time Devlin started in his mines we furnished him money for pay roll purposes.

Q. At times you furnished larger sums of money than the amount set up in this exhibit, did you not? A. We have.

Q. Did you uniformly get interest on those loans you made Mr. Devlin? A. When we advanced in advance of settlement day, which I stated was the 15th of the succeeding month, we got interest.

Q. Was that a uniform practice also? A. Yes.

Q. There was nothing in connection with the particu-
93 lar items that were set forth as your charge in Exhibit "E" that differed from the general practice in the course of business you had been following with Mr. Devlin, practically ever since he had been in the coal business? A. Well now, I don't exactly grasp your question.

Q. Whatever money you put up or loaned to Mr. Devlin on these three different occasions you mention in Exhibit "E" was along the same general plan you had previously advanced

him money on many occasions before that? A. These specific items here came to my mind forcibly, as I have stated, for this purpose.

Q. As I say, you had repeated that experience many times in the past with him? A. Yes.

Q. This is simply a continuation of a practice that had obtained between your company and Mr. Devlin's company many times before that? A. For pay roll purposes, yes.

Q. You didn't, of course, see Mr. Devlin disburse any pay-roll? A. I did not.

Q. So far as you know yourself, you don't know whether he spent a dollar of this money for his pay roll, do you? A. I know we made it out at pay roll times, and they were made for that purpose.

Q. So far as your own knowledge goes you do not know whether any of it was actually spent for pay rolls? A. No so far as my own knowledge goes, no.

Q. Do you know whether or not, as a matter of fact, Mr. Devlin may have used portions of this money in his pay rolls of other mines, this specific money? A. I know that at the time we made advances the pay rolls were due for this specific mine.

94 Q. You, of course, argue from that it must have been used here? A. Yes.

Q. But for all you know yourself this may have been used for any of his other mines? A. I didn't pay the miners, so I couldn't say.

Q. Now I want to call your specific attention to those three debits. Have you the account there before you. A. I have.

Q. Q. On what basis do you make the statement that your company advanced this money, or loaned this money to the Mount Carmel Coal Company to meet any pay rolls. A. This first item?

Q. Yes sir. A. This first item of $14,063.16 represents coal that Mr. —— represents advance on coal which Mr. Devlin should have paid, or furnished to us, on May 15, but failed to do so.

Q. Now, that is not the question I asked, Mr. Wellman. You stated, as I understood you, that each one of these items was to meet pay roll? A. Pay roll purposes. This had been advanced for pay roll purposes.

Q. I want to know where you see anything in that statement that indicates that that fourteen thousand dollars was loaned to meet any pay roll. A. The balance over and above the amount of his voucher or previous advance would have been for pay rolls, in the account.

Q. Do you know when the account originated that finally lead in this balance? A. Yes, it originated in April.

Q. What time in April? A. As it is an accumulated balance I could not give you the date.

Q. Would it be the latter part of the first part, in your judgment? A. It is the excess of amount over the coal furnished, therefore I can't tell you.

Q. Then it must have originated clear back in
95 March, if it was an excess?

A. It is an excess in April balance.

Q. Then it necessarily follows that the advancement you made was in March?

A. Not necessarily, it may have been the month of April.

Q. Can you say whether it was March or April?

A. My judgment is it was in April, because this is the balance of April.

Q. How much was the balance?

A. $24,063.16 at the time it was paid.

Q. Was that March pay roll, or April pay roll?

A. That was April—it is April pay roll.

Q. All on earth it is, is when you came to cast your account and strike your balance with Mr. Devlin on April 15, it happened—on May 15, it happened his account was overdrawn with you for $24,063.16? A. Yes sir.

Q. That is all that amounts to? A. Yes.

Q. As to what made up that balance you have no means of knowing at this time.

A. Yes, because it was made up from advances he had paid. We only gave advances for pay roll purposes.

Q. You had to buy coal of him right along—he was selling coal to you right straight along, and his coal bills amounted to more than his aggregated payroll did, didn't it? A. No sir.

Q. You mean to say he was just barely getting enough out of his Mount Carmel Coal Mine to meet his payroll?

A. I mean to say that during the month of April there was a balance of $24,000.

Q. For all the coal now that he had sold you, you had paid him and had overpaid him about $24,000.00?

A. No sir, he owed us.

Q. Certainly, you had overpaid him, he was owing coal he had not delivered you, $24,000.00? A. Yes sir.

Q. Then he settled that balance with you, didn't he,
96 by giving you two drafts?

A. Under protest. He offered us these two drafts, which were time drafts. We took them under protest.

Q. However that might be, you cleared that account, balanced his account by taking two drafts from Mr. Devlin?

A. Not at all. The understanding was if these drafts were not paid they would be charged against his coal voucher for the next month.

Q. As a matter of fact then, one of these drafts was paid on the 18th day of June?

A. It was paid June 19th, $10,000.00.

Q. And the other draft was paid?

A. The other draft was never paid.

Q. Now, have you included the interest in that draft?

A. We have; the draft that was not paid carried the interest for the two drafts.

Q. At what rate? A. Six per cent.

Q. Do you recall any conversation at all that you had with Mr. Devlin at any time with reference to the particular transaction relating to this $14,063.16? A. I do.

Q. When?

A. This draft for $23,000.00 was due in June 24; Mr. Devlin came in and asked for this draft, for the time for this draft to be extended at our bank, and we told them to extend the time, on his verbal agreement that it would be taken up on July 1st.

Q. That is, he said he would pay the draft if you would give him until the first?

A. He said the draft would be paid with the understanding if it was not is would be charged to his account.

Q. You had had one of your drafts paid on June 16, and he promised to pay you the other draft on July 1st.

A. Promised the other draft should be paid July 1st.

Q. And you agreed to that?

A. We agreed to carry it that way.

Q. Do you recall any other conversation that you had with Mr. Devlin with reference to this particular subject now, or have you testified to the sum and substance of your recollection.

97 A. It was agreed that we should charge this up to the account.

Q. Do you recall any other specific conversation you had with Mr. Devlin? You can answer that by "yes" or "no".

A. Yes.

Q. When?

A. The non-payment of this particular item; this particular item not being paid as agreed, we told him it would be charged to his account.

Q. On what date was this? A. After July 1.

Q. When? A. After July first.

Q. When did you have this conversation?

A. You mean the date?

Q. Yes.

A. I can't give you the particular date, except it was after July 1st when we knew it was not paid.

Q. How long after?

A. It was some time between July 1st and July 29th, some date between that, because that is the date we charged it up to his account.

Q. Now, Mr. Wellman, let me direct your attention to that second item. When did you ever have your first conversation with Mr. Devlin with relation to it? A. May 23, 1905.

Q. Now, do you mean to say that on that date you gave Mr. Devlin any money at all?

A. I can't say positively, but I think we paid him by check on that date.

Q. Let me refresh your recollection. Isn't it a fact that Mr. Devlin got that amount of money from the National Bank of Commerce, on his note?

A. That is not my recollection.

Q. Havn't you, subsequently when you came to pay it, taken up that note, and havn't you got the note of either Mr. Devlin or the Mount Carmel Coal Company in your possession now, that represents the identical payment of $20,280.00?

A. I can't say whether we took up the note or paid by check.

Q. Isn't it a fact that whatever paynent you did make was a payment to the National Bank of Commerce, the one you took up being of Mr. Devlin and the Mount Carmel Coal Company?

A. That I can't say, whether we paid check or took
98 up the note.

Q. You won't undertake to say, in the light of my suggestion, that you ever turned over to Mr. Devlin, any of that $20,000.00.

A. I won't say we did, no.

Q. For all you know the transaction took form in the National Bank of Commerce making Mr. Devlin a loan for that amount of money, you subsequently paying the loan and taking up the note. Won't you answer that? Did you know the form of the transaction was a loan made by the National Bank of Commerce to Mr. Devlin for this amount which you either guaranteed, or induced the Bank of Commerce in some form, to make, and subsequently you paid to the National Bank of Commerce that amount and took up the note?

A. It might have been for pay roll purposes, that was the custom. I can't tell you in regard to this transaction now, whether it was that note or not.

Q. Before I forget it—it is a fact that practically all of these payments your company made were to take up orders that had been given by Mr. Devlin on you from time to time?

A. No, some of the transactions were of that nature.

Q. If this $20,280.00 was a transaction arranged through the Bank of Commerce, as I suggested, you took it up in pursuance to some order Mr. Devlin had given upon you?

A. Mr. Devlin very often came in at payroll time, himself, for money, we would take up an order in order that he might have arrangement for the payroll.

Q. I thought I understood you to say you remembered the specific transaction of May 23, 1905, you had with Mr. Devlin with reference to this transaction.

A. With reference to this advance, yes.

Q. You took up the note, whether it was checked or paid back by order. I want to know if you clearly remember
99 what occurred on May 23?

A. I can't remember whether it was check or order.

Q. You don't know then whether your company put up the money?

A. They put up the money.

Q. On the 23rd? A. On the 23rd.

Q. If the company paid it up on the 23d, then the loan, if it was made by the National Bank of Commerce, must have been sometime before that wasn't it, and Mr. Devlin, or his company, must have gotten the money sometime before that date, wouldn't they?

A. That is very true, it may have been so.

Q. Why do you say this $20,280.00 was money obtained and used by Mr. Devlin on May 23?

A. Because Mr. Devlin represented to us that if he took up that obligation he could get his money for the payroll.

Q. Refer to the third item, $33,247.50; you remember specifically that your company didn't pay that money to Mr. Devlin?

A. No, we paid the American National Bank, Mr. Devlin arranging for his payroll affairs through that bank.

Q. Now, when did Mr. Devlin arrange, and when did he get that $33,247.50?

A. This specific note—

Q. That is not the question Mr. Wellman.

A. I was not present with Mr. Devlin when he got the money, I can tell from the transaction.

Q. You do not know anything about when that was, do you?

A. I know the date that is stated here, May 15.

Q. That is the date you see in front of you. Do you know anything about it now when Mr. Devlin got that money from the American National Bank, of your own knowledge?

A. No.

Q. Were you a party to any conversation that Mr.
100 Devlin had with reference to getting this money from the American National Bank.

A. Not in hearing of the American National Bank.
Q. With Mr. Devlin? A. With Mr. Devlin, I was.
Q. When was that?
A. At the time we made this advance to him.
Q. That is, at the time you took up the note?.
A. At the time we took up the note.
Q. You took up the note of Mr. Devlin's in the American National Bank, didn't you? A. We did.
Q. What date did you take up that note?
A. It shows here July 3, 1905.
Q. You mean merely that on July 3 you paid the National Bank of Commerce $33,247.50, don't you. A. We did.
Q. What did the American National Bank turn over to you when you made that payment?
A. They turned over the note.
Q. A note; did you know when that note had been made and who made it?
A. It states here, I haven't the note before me.
Q. Your company now holds the note of the Mount Carmel Coal Company for this $33,247.50, which you obtained from the American National Bank, don't it?
A. I think we have it in our possession.
Q. You took that note out of the American National Bank pursuant to some previous agreement you had with Mr. Devlin that you would do so? A. Yes sir.
Q. But you don't remember, if you ever knew, that Mr. Devlin himself got the money from the American National Bank?
A. Mr. Devlin represented to us he got the money on the date we charged him.
Q. On July 23? A. On July 23.

Q. You mean to say that he got the $33,247.50 on
101 the note that you took up?
A. No, got it on a new note.
Q. I am talking about the note you took up.
A. He probably got the money May 15.
Q. Do you know anything about it or are you guessing at it, Mr. Wellman?
A. I am not guessing. I mean we are carrying out the agreement we had with him to get the note.
Q. You mean to say that you went down there and took up one of the Mount Carmel Coal Company's notes on July 3?
A. They sent it to us?
Q. Then so far as you know Mr. Devlin went down and negotiated a new loan there?
A. That was the understanding when we took up that note.
Q. Do you know whether it was done or not?
A. We had advice it was done.

Q. Have you got the note you got from the American National Bank?

A. I haven't it here.

Q. Where is it?

A. I presume it is in our papers.

Q. You refused to surrender it to the Trustees? Let me ask do or do you not claim that note obtained from the American National Bank?

Counsel for the Railroad Company objected to the question as being incompetent, irrelevant and immaterial.

The Referee: I will allow it to be answered in any way he sees fit to answer it, and I will reserve a ruling on the question.

A. I don't think we have ever arrived at any decision whether we claimed or did not claim the note. We held it for surrender. The note was sent to us for surrender. All we want is to be satisfied that the obligation we have against them will be taken up in the shape of voucher.

102 Re-direct Examination.

Questions by Mr. Smith:

Q. Mr. Wellman, in order to understand this thing, I will ask you this question. I will put a hypothetical case; Mr. Devlin would have a loan say of $20,000.00, his note in some bank—give an order on the Treasurer, or the bank would in fact, on the Treasurer, that they had his note and would like to have it paid when he furnished coal enough to the company to pay it. There was some transaction of that kind, wasn't there, from month to month? A. Yes sir.

Q. Now, when that note came due would Mr. Devlin come around and talk with you concerning it, concerning his payment, at any time when he wanted money for his payroll?

A. He did.

Q. Well now, when you paid money to satisfy these notes about the time Mr, Devlin wanted to satisfy his payroll, was that done under an agreement with him that he would pay that note and get more money?

A. That was the only agreement under which we paid it.

Q. All these payments were made then at the request of Mr. Devlin, was that he might get money somewhere for his payroll in the month you have described?

A. They were.

Q. What is the effect on a mine if the payroll is not paid to the men? Do you know?

A. I have always understood the men would walk out.



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Re-cross Examination.

Questions by Mr. Histed:

Q. Now to summarize the statement you have made to Judge Smith, I understand you that Mr. Devlin, on in-
103 stances had borrowed from banks a certain amount of money, possibly to meet his payroll, and then when that note came due, and his next payroll must be met, he was not able to raise the money by further loans from those banks until he had paid for the notes he had negotiated at these banks, and that your company advanced the money to those banks and took up the notes and then they let Devlin have the additional money? That is a fact is it? A. Yes.

Re-direct Examination.

Questions by Mr. Smith:

Q. Covering these items, these advances you made which aggregated with this credit $57,304.16, were those advances made under the statement of Mr. Devlin in each particular case that it was for the purpose of using the money for his payroll of the Mount Carmel Mines.

A. They were.

Witness excused.

Cyrus Leland, a witness called on behalf of the Atchison, Topeka & Santa Fe Railway Company, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Smith:

Q. Mr. Leland you were one of the Receivers, and what was the date of your appointment?

A. July 7th, I think.

Q. What was the date of your appointment as Trustee?

A. Well, it was the 19th day of December, and qual-
104 ified to take charge as Trustee the first day of January, 1906.

Q. The same persons were appointed Trustees as were Receivers?

A. The same were elected Trustees.

Q. When you were appointed receivers did you immediately take possession of the Mount Carmel Coal Mines?

A. We did.

Q. Did you continue to operate them under these contracts, so far as the Santa Fe Road was concerned?

A. I don't know much about the contract; I know they had a contract and we supplied them with coal.

Q. You knew generally what arrangement there was?
A. I had never read the contract, but I had a list of the prices.
Q. You knew there was a contract in existence?
A. Yes.
Q. At the time you took possession of the Mount Carmel Company down there what was the amount of the payroll, speaking generally.
A. Somewhere in the neighborhood of a hundred thousand dollars a month. When I was first in the business it was a little less than that; about eighty thousand.
Q. What do you mean by payroll?
A. The payroll of the officers and men in the mines.
Q. There are more men than officers?
A. Yes, I think a good many more.
Q. On an average of how much coming to each miner?
A. They mined by the ton and the payroll, the most of it, the $50,000.00, all but two or three thousand dollars would be paid to the men.
Q. How manp men would you have down there?
A. Fifteen or eighteen hundred. I understand from the Superintendant they had about two thousand miners, but they don't all work every day.
Q. How much would each one get on an average.
105 A. I haven't figured it out, but I suppose the two thousand would get about a hundred thousand a month.
Q. You have some Superintendents; how many of them?
A. There are two superintendents there.
Q. Then you have a few bosses? A. We have pit bosses, and other bosses.
Q. They are paid how? A. They are paid on the payroll.
Q. By the month? A. Yes, paid by the month, but they get their pay every two weeks, every pay day they get their share of the money.
Q. When you first went in as receiver you had to rustle to get money to pay the miners?
A. Borrowed $50,000.00 the day I was appointed.
Q. You borrowed some afterwards? A. Yes sir.
Q. They were borrowed on receiver's certificates authorized by the Court?
A. Yes, authorized by the Court. That was to pay the miners for the last half of June.
Q. What is the effect on the running of the mine like that if the miners are not paid when the wages are due?
A. We always paid them, but I understand if they are not paid they don't like to work.
Q. It is important for a mine to have the payroll satisfied very two weeks?

A. Sure, a failure makes danger of stopping business. That is the reason I thought it was very necessary to send them the money down there the 7th, because the pay day was next day.

Q. Since the receivership, on coal furnished to The
106 Atchison, Topeka and Santa Fe Road they have advanced money for these payrolls?

A. They have advanced money for payrolls every pay day after I borrowed that $29,000.00. After that they advanced money, but we had furnished more coal than they had advanced.

Q. You furnished more coal than you got money?

A. Yes, more than the payroll amounted to. I think possibly the way the payments have been made they furnished somewhere from the 4th to the 15th of the month.

Q. Are these Mount Carmel mines a valuable estate in the hands of the receivers or trustees for the Mount Carmel Estate?

A. Yes sir, very valuable.

Cross Examination.

Questions by Mr. Histed:

Q. As I understand, Mr. Leland, you have been selling coal to the Santa Fe from the time you were appointed receiver? A. Yes sir.

Q. And money that you have received from them on account of their purchase does not equal the amount of coal you furnished? A. No sir.

Q. They have paid you on account certain sums?

A. Yes sir.

Q. When you and Mr. Hurley and Mr. Reeves were appointed receivers, you in a general way parceled out your respective duties, did you not. A. Yes sir.

Q. Who took actual charge of, or supervision of the Mount Carmel? A. I remain in the office about all the time.

Q. You have had active supervision and manage-
107 ment of the Mount Carmel mine for the receivers.

A. Yes sir.

Q. Mr. Reeves, of course, lives in Streator, and looks after the Illinois property?

A. Looks after the Illinois property.

Q. At the time you were appointed receivers, did you know of any claim of any verbal contract with the Santa Fe by either Mr. Devlin or the Mount Carmel Coal Company?

A. No, I didn't.

Q. Did you ever know there was any contention by the Santa Fe Railroad Company that Mr. Devlin had attempted to make any verbal contract in any respect modifying any written lease?

Mr. Smith: We object to the question as being incompetent. We say the receivers are not purchasers in good faith.

Mr. Loomis: I will hear the testimony but will reserve ruling.

A. No, I didn't.

Q. Then of course you never undertook to assume any verbal contract and to turn over any coal pursuant to any verbal contract Mr. Devlin may have made with the Santa Fe.

A. No, I never knew of that. I might mention this: It may have been sometime in August, sometime quite a while after we had charge, when we wished the Santa Fe to advance so much money on account of paying our payrolls in different mines in Kansas, was the first I knew there was any hitch anywhere. Mr. Hurley was away and Mr. Wilder had instructions from Chicago that they could not advance money unless the back was paid for, some former advances made. I went up to Mr. Wilder's office to wire Mr. Hurley, next day was pay day. They said he had just got back. Mr. Copeland and I explained it to Mr. Hurley and Mr. Hurley said "we must pay to-
108 morrow". That money was sent, was deposited by the Santa Fe to the National Bank, Pittsburg, Kansas, subject to the order of our manager, to pay the miners next day. Always afterwards I receipted for this money, sort of a receipt whereby they didn't waive any rights. I did that thinking it didn't make any difference as receivers, as far as I was concerned.

Q. You had never, or the receivers or trustees have never undertaken to carry out this alleged verbal agreement Mr. Devlin is supposed to have made prior to the receivership?

A. I never knew anything about it.

Q. Since the claim you never undertook to carry it out?

A. I never knew anything about it. I understand they claimed they advanced money for the coal, and they had a right to the payment.

Witness excused.

Walter Reeves, a witness called on behalf the Mount Carmel Coal Company, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Histed:

Q. Mr. Reeves, you are one of the receivers of the Mount Carmel Company? A. Yes.

Q. You live in Streator?

A. I live in Streator, Illinois.

Q. Do you remember when you were appointed?

A. I can't fix the exact date of the appointment here at Topeka. I was appointed receiver of some of these properties on the 14th day of July, and shortly thereafter appointed here.

109 Q. The 17th it was. A. Yes.

Q. You have been present during this hearing? A. Yes.

Q. And heard the testimony? A. Yes.

Q. I will ask you when, if ever, you heard of any claim of a verbal contract between the Santa Fe and the Mount Carmel Coal Company, or Mr. Devlin? A. Today for the first.

Q. So far as your understanding goes, under what kind of a plan was the properties being operated, the Mount Carmel properties?

A. So far as my knowledge goes there was neither a verbal nor a written one ever made between the Santa Fe Railroad and the Mount Carmel Coal Company at any time.

Q. This subject of advances, so called, made by the Santa Fe Railroad Company to the receiver during the operation of the plant, has been mentioned. I will ask you if you have had any conversation with any of the officers of the Santa Fe upon the subject of advances. A. Yes.

Q. When? A. At different times. The first, I think, with Mr. Copeland, probably the 19th or 20th of October last, and more recently with — the gentleman's name escapes me for the moment but he is assistant to the President.

Q. Mr. Jansen? A. Mr. Jansen is the name. That was a week ago today.

Q. What was the conversation with Mr. Jansen?

Mr. Smith: I object to the question as being incompetent, irrelevant and immaterial. The party mentioned had no authority to bind the road by any conversation agreement or contract.

Objection overruled.

A. I would like to state what I know about them advancing. The management of the Devlin Coal Company, by con-

110 venient arragement with the receivers, was left in my hand. When coal had been mined, after the appointment of receivers, and was needed for payroll purposes —

Mr. Smith: After the receivership?

A. Yes. I asked for money for the coal that had been mined under the receivership and delivered to the Santa Fe at Toluca, Illinois. It came finally, but with it a prepared receipt for me to sign. I haven't it with me but can give you the substance of it. The substance of it was that this money was advanced by the Santa Fe Railroad for payroll purposes, and to be used only for that purpose. I refused to sign that cha-

racter of receipt. Shortly thereafter, or some time thereafter I saw Mr. Copeland and told him I thought it was no part of the business of the Santa Fe Railroad what the receivers did with the money from coal mined and came into their hands during their administration, and I would sign no such receipts, and would use the money for any and for all purposes. I was advised Mr. Leland would sign receipts here; it was so done. I took that up a week ago today with Mr. Jansen, Assistant to the President, and asked what they meant by insisting on advancement. I didn't so regard it and would not so acknowledge it and would not so receive it. He told me that before the bills of lading for the coal had passed through the Purchasing Agent's office Mr. Hodges, and had reached the treasurer's office, so as to be bills payable we were calling upon the Treasurer, for the money and he was advancing it prior to receiving the vouchers therefor out of the Purchasing Agent's office, and they were using it in that term; so I have relied since that upon that version of what they mean by advancing money to the receivers.

Mr. Smith: I move to strike all the answer out.

Motion overuled.

111 Cross-Examination.

Questions by Mr. Smith:

Q. Now, you don't pretend to say, Mr. Reeves, you have repudiated the written contract, or lease with the Mount Carmel properties entered into by Mr. Devlin and the Santa Fe Road, and these other coal companies?

A. There has been no formal repudiation of any contract nor any formal acknowledgment by the receivers, us far as I know, with the Santa Fe or any other company.

Q. You know you are proceeding to deliver coal under the contract to the Santa Fe?

A. I don't so understand it. I understand we are selling coal to the Santa Fe upon the same terms coal had been sold to it prior to the bankruptcy of Mr. Devlin, but that we are operating under contract with the Coal Company, I do not so know.

Q. Don't you know, as a lawyer, that under this lease which does not expire for six months or a year, you could not operate it any other way?

A. No sir, I do not know that. I do not think that is correct, Judge.

Q. You think the receivers could get greater rights than Devlin got? A. No, I don't think that. I don't think that is implied in the previous question.

Q. You don't know one way or the other; whether you are operating under that lease or not? A. I know my opinion of it.

Q. You haven't repudiated that lease? A. There has been no formal repudiation that I know of.

Q. Don't you know the order is that you shall go on and mine coal? A. I don't know of it. You say the order provides we shall go on and mine coal?

Q. Yes. A. I do not know that is true; I don't know it is not true.

Witness excused.

112 Judge Smith:

We offer in evidence, the order of the District Court in the matter of the petition in bankruptcy of Charles J. Devlin, Mount Carmel Coal Company and others, which was signed by the Judge of the United States District Court the 7th day of July, 1905, and particularly that part of it which requires that "if the receivers fail to operate the mines owned by the Cherokee & Pittsburg Coal & Mining Company, in accordance with the provisions of the contract between said Cherokee & Pittsburg Coal & Mining Company, and the Mount Carmel Coal Company, then said Cherokee & Pittsburg Coal & Mining Company may at once take possession of said mines and operate the same as fully as if said lease had never been made" and the further part of the order that "for indebtedness existing for the pay of wages due to workmen, clerks and servants, which have been earned within three months before the commencement of this proceeding, not to exceed three hundred dollars to each claimant, shall be paid in full by the receivers."

Mr. Loomis: It will be admitted in evidence.

Mr. Histed: It is further admitted that on the 17th day of July, 1905, Walter Reeves was appoined an additional receiver of the Mount Carmel Coal Company and other properties, having the same powers and duties as the other receivers, and that he acted as receiver in the Mount Carmel case under this original order in the Charles J. Devlin case.

113 In the District Court of the United States for the District of Kansas First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

In Re Petition of Atchison, Topeka and Santa Fe Railway, et al.

Stipulation.

It is agreed that the petitioners, the Atchison, Topeka and Santa Fe Railway Company, may offer as testimony the affidavit of W. H. Rossington made on the 15th day of January, 1906, and the said affidavit shall be treated as though the witness were present and offering to testify to said matters contained therein, before the Referee, and shall be subject to all objections which the Trustees might make thereto if the said witness were present and testifying orally.

CLIFFORD HISTED,
Attorney for Trustees.

In the District Court of the United States for the Dis-
114 trict of Kansas First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Affidavit of W. H. Rossington.

State of Kansas,
Shawnee County.—ss

W. H. Rossington, being first duly sworn, deposes and says: About the 19th or 20th of June, 1905, I was sent for by Geo. R. Peck to come to the house of the late Charles J. Devlin. On arrival I found Mr. Peck and Mrs. Devlin and some one else—I have forgotten whom, but some one intimately connected with Mr. Devlin's household or business. I had just returned from Chicago, where I had left Mr. Peck late on the day of the 19th, I think, and had no idea that he was in Topeka until I was telephoned by him, and was then informed by Mrs Devlin and by Mr. Peck that Mr. Peck had been telegraphed for owing to an important and delicate crisis in the affairs of Mr. Devlin. Mr. Devlin had a few days before been visited with a stroke of apoplexy, and I had learned of that fact for the first time on my arrival home. Mr. Peck at once went into a consideration of the matter that called him to Topeka, and it was this: Mr. Devlin's illness was of such a nature that he could not give any attention to his affairs then and probably not for an indefinite period of time. That he had a slight hemorrhage upon the brain which was in process of being absorbed. His condition was considerably improved and his progress towards recovery depended wholly upon the fact that he did not take any part in his business or even be interrogated about it I was for the first time informed that he owed a large amount of money, but that he had assets that were of

three or four times the value of his debts, but so far
115 as they knew they had no ready money to meet the urgent and impending current expenses of carrying on the coal business. That something like 2,000 men were employed by the Mount Carmel Coal Company and these men were paid every fortnight. I learned these facts first from Capt. Peck and from Mrs. C. J. Devlin and afterwards from Col. J. D. Norton, who was in the general management of the affairs of the Mount Carmel Coal Co., at its office in the city of Topeka. This conversation was, I believe on Wednesday of that week,-I will not be so sure of that,—but at all events the pay roll was due and payable on Saturday of that week, and there was therefore only two or three days in which to raise these funds. A general conversation ensued in reference to the affairs of Mr. Devlin which have no particular bearing upon the matter in question here, and then Mr. Peck and myself repaired to the office of the Mount Carmel Coal Co., in Topeka and entered upon a conference with Col. Norton, who confirmed all that had been said, who did not know where he could realize any money, who for the first time told me that their bank credits had been practically exhausted and then and there the matter was discussed with reference to the consequences that would flow from failure to pay these men promptly. It would be impossible to explain to them that by reason of Mr. Devlin's sickness the money for their pay would not be forthcoming. They would be there for their pay and expecting it and a failure to pay it would result in an immediate strike, and this strike would be followed by a crisis in Mr. Devlin's affairs by possibly bringing down upon him and his various companies
all of their creditors in a mad scramble to secure their
116 debts, and also an immediate closing of the mines. I was also informed at that time by Mr. Norton of the nature of the tenure of the Mt. Carmel Coal Company of its mining properties in Southeastern Kansas. I learned that they were held upon a lease from the Atchison, Topeka and Santa Fe Railway Company. The condition of that lease was that the Mount Carmel Company should operate uninterruptedly the mines and daily furnish to the Railway Company coal for the operation of its railroad. A failure to operate the mines, therefore, would work a forfeiture of the lease. That all these catastrophes would follow a failure to obtain the money. I think it was Mr. Peck who suggested, "Well, will not the Santa Fe advance the money?" when we were appalled to learn from Mr. Norton that the last two months' accounts with the Santa Fe had been hypothecated for money for this very purpose, viz., to pay off the operatives in the coal mine, and there was no money coming at the end of the month of June on account of the coal furnished to the Santa

Fe, but on the contrary that the coal that was agreed to be furnished on account of these advancements was still in arrears. Mr. Jobes came up that evening from Kansas City and at a conference held at that time between Mr. Jobes, Col. Norton and myself, it was agreed that Mr. Jobes and Mr. Peck should make an effort to raise the money in Chicago by pledging or selling some of Mr. Devlin's properties. I held a long telephone conversation with Mr. Peck the next day and then learned for the first time that there were none of the properties of Mr. Devlin or that were operated under his name and were treated as his, that could be handled for that purpose, because Mr. Devlin had hypothecated the stock and bonds of all of these companies, not to one person or one bank, or one individual, but in parcels to many banks and to
117 many individuals; that there was nothing free or loose that could be handled. I communicated with Mr. Peck I think twice or three times that day, and was informed among other things that Mr. Peck had had an interview with the Santa Fe people, but without result, the proposition being, as I understood it, to have them advance money on security to be furnished. Later on, however, Col. Norton on his own account visited Edward Wilder, who had just returned, if I remember right, from a protracted absence taken for the sake of his health, and had told him in general terms the situation. I learned this from Col. Norton, and that Mr. Wilder, being [appraised] of the situation, had then and there agreed to advance the money upon the potential bills or sums receivable from the Santa Fe by the Mt. Carmel Coal Co., for, I think, the month of July. I know that this advancement caused great rejoicing, because it prevented the catastrophe which would have occurred in Mr. Devlin's affairs, and which would have in a measure, if not absolutely, prevented holding his property together against proceedings of insolvency in the United States Court—would in other words, have prevented the handling of the properties as they are now being handled, in all likelihood, and two weeks were thereby gained in which to confer concerning and arrange Mr. Devlin's affairs to prevent his possible bankruptcy. The money, as I understood it and was informed by Mr. Norton, was available solely for the payment of the current pay rolls of the Mt. Carmel Company, and amounted as I remember to $41,000 or $43,000.

W. H. ROSSINGTON.

Subscribed and sworn to before me this 15th day of
118 January, 1906.

E. B. NELSON,
Notary Public.

Seal N. P.
My commission expires Jan. 18, 1907.

In the District Court of the United States for the District
119 of Kansas First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

In Re: Petition of Atchison, Topeka & Santa Fe Railway, et al.

The trustees make the following objections to the testimony of W. H. Rossington, in form of affidavit offered by the petitioners:

I.

To all that part of the testimony beginning with the words, "On arrival I found Mr. Beck, Mrs. Devlin and someone else" on page 1, and continuing to the sentence "I learned these facts first from Captain Peck, etc," on page 2, because the same is hearsay and immaterial, and amount to deduction, conclusions and inferences, and is not a statement of facts relevant or germain to the issue before the Referee.

II.

In the sentence immediately following "I learned these facts first from Captain Peck and from Mrs. Devlin, and afterwards from Col. J. D. Norton, who was in the general management of the affairs of the Mount Carmel Coal Company at its office in the City of Topeka," the trustees object to all of the testimony contained in said sentence,

1. Because it does not purport to give a conversation but a mere conclusion and inference therefrom.

2. Because any declaration made by either Capt. Peck or Mrs. C. J. Devlin could not be binding upon the Mount Carmel Coal Company or these trustees.

120 3. Because the statement of the relating of Col. J. D. Norton to the Mount Carmel Coal Company is a conclusion and not a statement of fact.

4. Because any statement or declaration made by Col. J. D. Norton to the witness, a stranger to the transaction, and not in preformance of any duty by the said Norton for the Mount Carmel Coal Company, would be hearsay, inadmissible and not binding upon either the Mount Carmel Coal Company or the said trustees.

III.

The trustees object to all that portion of the affidavit beginning with the words, "This conversation was I believe, on Wednesday, etc." on page 2, and continuing to the words, "Later on, however, Col Norton on his own account, etc." on page 4, because all of the matter contained in said affidavit thus indicated is hearsay and deductions, conclusions and inferences drawn by the witness, and not the statement of any fact relevant to any issue involved in this hearing, and the same and all of said testimony thus objected to is incompetent and inadmissible against these trustees.

IV.

The Trustees object to the following testimony, "Later on, however, Col. Norton, on his own account, visited Edward Wilder, who had just returned, if I had remember right, from a protracted absence taken for the sake of his health, and had told him in general terms the situation. I learned this from Col. Norton, that Mr. Wilder being[appraised]of the situation had then and there agreed to advance the money upon the potential bills or sums receivable from the Santa Fe by the Mount Carmel Coal Company for, I think, the month of July, appearing on page 4 of said affidavit, because:

1 The same is hearsay and no authority on the part
121 of the said Col. Norton to bind the said Mt. Carmel Coal Company by any agreement with the said Edward Wilder or otherwise, does not appear.

2. Because the same is a statement of a conclusion derived from a supposed conversation with Col. Norton, and is not a statement of facts.

3. Because any declarations made by the said Norton to the witness were not in the scope of authority of the said Norton, and not in the furtherance or prosecution of any business of the Mr. Carmel Coal Company, and are inadmissible against it and against these trustees, and said testimony and each and every part thereof is incompetent and irrelevant to the issue pending before the Referee.

V.

The trustees further object to all of the remaining portions of said affidavit beginning with the words, "I know that this advancement caused great rejoicing, etc" because it is immaterial, and a mere statement of the conclusions and private belief and notions of the witness, and not the statement of any facts in the case.

VI.

And the trustees generally object to all of the said testimony contained in said affidavit because of the further fact that it does not relate to any issue tendered by the petition in this case, and does not bear upon any transaction or account or item thereof set forth, in the petition in this case and relied upon by the said petitioners.

CLIFFORD HISTED,
Attorney for Trustees.

122 In the District Court of the United States for the District of Kansas, First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

On petition of The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal & Mining Company.

The Court having heretofore heard the evidence in the matter of the petition of The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and The Cherokee & Pittsburg Coal & Mining Company, praying for an order on the Receivers requiring them to deliver to The Atchison, Topeka & Santa Fe Railway Company a certain amount of coal to carry out the provisions of a certain contract, or authorize the said petitioners to cancel said contract and to take possession of the property therein referred to; and the court also having heretofore heard the arguments of counsel and being fully advised in the premises, finds that the application of the said petitioners should be denied.

It is therefore ordered accordingly this 27th day of January, 1906.

N. H. LOOMIS,
Special Referee.

Endorsed: No. 816. In the District Court of the United States for the District of Kansas, First Division. In the matter of The Mount Carmel Coal Company, Bankrupt. In Bankruptcy. On petition of The Atchison, Topeka & Santa Fe Railway Company and others. Record for review certified to the Judge by the Referee. Filed Feb. 10, 1906. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

123 In the District Court of the United States for the District of Kansas, First Division.

In Re Mount Carmel Coal Company, Bankrupt. No 816. In Bankruptcy.

Order and Decree.

And now on this 24th day of February, 1906, this cause and matter above entitled came on to be heard on the petition filed by The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, and upon a transcript of the evidence and all other proceedings had before Hon. N. H. Loomis, Special Referee in Bankruptcy in the above entitled cause and matter, for review of an order made by said N. H. Loomis, Special Referee, denying to the petitioners the relief prayed for in their said petition filed in said cause and matter.

The petitioners appears by W. R. Smith and Robert Dunlap, their attorneys, and the bankrupt appeared by C. Leland, Jr., Trustee for said Bankrupt, and by Clifford Histed, his attorney.

After reading the evidence as contained in said transcript and proceedings had before said special referee, N. H. Loomis, and hearing arguments of counsel for all of the interested parties, the said cause and matter was taken under advisement by said District Court and afterwards, to-wit, on the 5th day of March, 1906, having fully considered the evidence contained in said transcript, and the proceedings had before said N. H. Loomis, Special Referee, and the arguments of counsel, and being fully advised in the premises,

It is on this 12th day of March, 1906, ordered by said District Court that the prayer of said petitioners be denied and that the order heretofore made by said Special Referee in
124 said cause and matter be and the same is hereby in all things affirmed and approved.

The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company at the time duly excepted and excepts to the findings, decision and order of the Court and each of them, and to the rendition of said order and decree and every part thereof.

JOHN C. POLLOCK,
Judge of the United States District Court.

Endorsed: No. 816. In Re. The Mount Carmel Coal Company, Bankrupt. Order and Decree. Filed March 12th, 1906. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

In the District Court of the United States, District of
125 Kansas, First Division.

In Re Mount Carmel Coal Company, Bankrupt.
No. 816 Bankruptcy.

Memoranda of Decision on Petition of The Atchison, Topeka & Santa Fe Railway Company, the Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company for Review of an order made by N. H. Loomis, Special Referee in Bankruptcy, denying petitioners certain relief prayed as against the Receivers and Trustees of the Bankrupt.

This controversy arises over the terms of a certain tripartite agreement or lease entered into between The Osage Carbon Company and The Cherokee & Pittsburg Coal & Mining Company, owners of certain large coal properties, as parties of the first part, The Mount Carmel Coal Company, now bankrupt, party of the second part, and The Atchison, Topeka & Santa Fe Railway Company, party of the third part, by the terms of which the bankrupt was to operate the coal properties on terms therein specified until June 1, 1906, and sell a portion of the product from said mines to the railway company at prices fixed in said agreement during the term thereof. In the month of July, 1905, The Mount Carmel Coal Company was adjudged a bankrupt. The present trustees were, by order of this court, appointed receivers of the property of the bankrupt company, and have as such receivers and trustees in bankruptcy under the order of this court performed fully the terms of the contract as it is written, with the coal company and the railway company.

126 The origin and exact nature of the claim made by petitioners is fully set forth in the written opinion of the referee, Hon. N. H. Loomis, filled therein, as follows:

"The petitioners entered into a contract with Charles J. Devlin on or about the first day of October, 1896, whereby they leased to him certain coal and mineral rights in Osage and Crawford counties, Kansas, for a term of three years. The lease provides for the payment of certain royalties by Mr. Devlin for coal taken from the leased premises, and also makes provision for the furnishing of certain amounts of coal to The Atchison, Topeka & Santa Fe Railway Company (hereinafter called the Santa Fe Company), one of the lessors, at prices specified in the lease. On the first day of March, 1897, this lease, by and with the consent of the petitioners, was duly assigned by Charles J. Devlin to The Mount Carmel Coal Company.

"The said lease was modified and its terms extended by subsequent agreements until June 1, 1906. The extension agreements required the Mount Carmel Coal Company to give a bond in the sum of $100,000.00, conditioned for the faithful performance of the terms of the contract.

In the conduct of its business it become necessary for The Mount Carmel Coal Company to borrow money from time to time, with which to meet its pay rolls. At times the credit of The Mount Carmel Coal Company became exhausted and it was unable to borrow money from the banks without first taking up obligations held by them. Upon such occasions the Coal Company, through its President, Chas. J. Devlin, would make application to the Santa Fe Company for assistance in the way of procuring funds with which to meet its pay rolls.

"The manner in which this was done is well summarized in the testimony of Mr. Wellman, Assistant Treasurer of the Santa Fe Company, on re-cross examination. It reads as follaws:

Q. Now to summarize the statement you have made to Judge Smith, I understand you that Mr. Devlin, on instances, had borrowed from banks a certain amount of money, possibly to meet his pay roll, and then when that note became due, and his next pay roll might be maintained, he was not able to raise the money by further loans from those banks until he had paid for the notes he had negotiated at these banks, and that your company advanced the money to those banks and took up the the notes, and then they let Devlin have the additional money. That is the fact, is it? A. Yes.

"The testimony also shows that these advances made by the Santa Fe Company to enable the Mount Carmel Coal Company to meet its pay rolls, were to be paid by the delivery of coal under the terms of the lease above referred to.

"Article XXII of the lease covers the sale and delivery of coal to the Santa Fe Company, and reads as follows:

ARTICLE XXII.

"Said C. J. Devlin shall sell and deliver to the Railway Company, on its cars at the mines (except in case of accidents, strikes or causes beyond his control) and the Railway Company shall purchase, in such quantities as are required daily, all the coal required by it in the operation of the lines of railroad in Kansas, as far west as and including Newton, which, it may own, control, or operate, and such portion of its supply
127 from Kinsley to Newton, including Kinsley and tributary branches, as it may from time to time elect, Provided, that the supply for Atchison, and Leavenworth, may be bought from other parties than said C. J. Devlin, at the election of the Railway Company, and Provided, Further, that the coal supply herein contracted for may be increased to an amount not over 50,000 tons per year for use on lines other

than those described in this article, if owned, leased, controlled or operated by the Railway Company. All coal so taken by the Railway Company shall be upon the following terms and conditions:

"1. That lump coal so furnished shall be screened lump coal, as free from slack, slate and other impurities, as the nature of the coal will permit, by the use of the usual appliances for screening and preparation.

"2. That the railway Company shall have the right to inspect the coal at the mines and may reject any which is no screened and prepared as above specified.

"3. That the railway Company shall pay to said C. J. Devlin on or before the 15th day of each month, for all coal so delivered during the preceding calendar month, per ton of 2,000 pounds, track scale weights at the mine, as follows:

(a) One dollar and forth-nine cents ($1.49) per ton, mine run coal in the Osage District.

(b) One dollar and fourteen cents ($1.14) per ton screened lump in the Cherokee District.

(c) Eighty-nine cents ($.89) per ton mine run coal in the Cherokee District.

(d) Twenty cents ($.20) per ton, slack coal, in the Cherokee District.

(e) One dollar and six cents ($1.06) per ton for lump and nut coal mixed, in the Cherokee District.

"4. That the Railway Company shall have the right at all reasonable times, to examine the track scales and to inspect the books and papers pertaining to the weighing of the coal.

"5. That in the event of accident or strike at the Cherokee & Pittsburg Coal & Mining Co.'s. mines, which prevents said C. J. Devlin supplying coal from that mine, or if the Railway Company shall elect to take all or any part of its coal supply from other mines controlled by said C. J. Devlin, then the railway company shall itself pay the trackage or switching charge on such coal.

"6 That if C. J. Devlin is obliged to pay an advance in the prices now paid to miners for mining coal, which are,

| | | |
|---|---|---|
| Osage City, yearly | $1.25 | per ton. |
| Peterton, " | 1.21 | " |
| Scranton, " | 1.03 | " |
| Frontenac, summer | .87 1-2 | " |
| " winter | .95 | " |

128 then the price to be paid by the Railway Company shall be increased to the extent of such advance in mining prices,

and in the event of a reduction in the mining prices, the price to be paid by the Railway Company shall be reduced to the extent of such reduction in mining price, provided, that if coal shall be mined at any mine or place other than those above mentioned, then said coal shall, within the meaning of this article, be treated in precisely the same manner as if mined at that mine or place above mentioned, to which it is nearest in location.

"7. That in case the railway company shall elect within one year after October 1, 1896, to take its supply of coal for any other portion of its lines during the balance of the term hereof from the mines hereby leased, said C. J. Devlin shall furnish such coal at the same price as hereinbefore provided, upon receiving at least ninety (90) days' notice of the approximate quantity of coal required daily."

"It is claimed by petitioners that at the time the arrangements were made by the Santa Fe Company to advance money to enable the Mount Carmel Coal Company to meet its pay rolls as aforesaid, that the terms of the written contract between the parties were modified by the oral agreement with respect to advancing money and receiving pay therefor in coal to be furnished by the Coal Company, and that the agreement with respect thereto became a part of the original contract and subject to all of its terms.

"Under the terms of the written lease the contract may be declared forfeited by either party for failure to comply with its terms. The forfeiture clauses read as follows:

"Article XVII.

"This lease and agreement shall continue for three (3) years from the date hereof, but may be terminated by and at the option of the three parties hereto as follows:

"(a) By the Coal Companies, or the Railway Company, for a failure by said C. J. Devlin to perform any of his obligations, covenants or agreements, if within thirty (30) days after written notice of such failure, and the nature of it, he does not cure such failure by performance, satisfactory to said Coal Companies and to the Railway Company.

"(b) By said C. J. Devlin for a failure by either of the other parties to perform its obligations, if within thirty (30) days after written notice of such failure and the nature of it, it does not cure such failure by performance, satisfactory to said C. J. Devlin.

"In the event of a termination by either method aforesaid, such termination shall operate as to all parties hereto and extend to all the provisions hereof, except such as from their

nature are to be performed in the event of termination, but such termination, or right to terminate, shall not effect the right to recover damages for any such failure, or in any way relieved either party from his or its covenants and agreements hereunder.

"Article XXI.

"If the said C. J. Devlin shall fail to pay the rental or royalties herein reserved, or any part thereof, on the day when the same become due and payable under the provisions hereof, and shall continue in such default for thirty (30) days, or if default shall be made by him in any of his covenants and agreements herein contained, it shall and may be lawful for
129 said Coal Companies, their attorneys, agents or assigns, at their election, to declare the term herein provided for ended, and unto the said demised premises, or any part thereof, either with or without process of law, to re-enter, and the said C. J. Devlin, or any other person or persons occupying, in, or upon the same, to expell, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy, as their first and former estate; and to distrain for any rent, royalty or other sum that may be due hereunder, upon any property belonging to the said C. J. Devlin, whether the same be exempt from execution and distress by law or not, and said C. J. Devlin in that case hereby waives all legal rights which he now has, or may have, to hold or retain any such property under any exemption laws now in force in this state, or in any other way, meaning and intending hereby to give to the said Coal Companies, their successors and assigns, attorneys or agents, a valid and first lien upon any and all goods, chattels or other property belonging to said C. J. Devlin which said C. J. Devlin may place upon the demised premises, as security for the payment of said rentals, royalties and other sums in the manner aforesaid, anything hereinbefore contained to the contrary notwithstanding, and at the end of the term herein provided, or sooner in case of termination as provided in Article XVII hereof; or, in case said C. J. Devlin shall fail to promptly and properly keep and perform each and every one of his covenants, undertakings and agreements herein provided for, the said C. J. Devlin covenants and agrees to surrender and deliver up said demised premises and property, peaceably to the said Coal Companies, their successors, attorneys, agents or assigns, immediately upon such termination of said term; and if said C. J. Devlin shall remain in possession of the same after notice of such default, or after the termination of this lease, in any of the ways above named, or as fixed herein, he shall be deemed guilty of a forcible detainer of the premises under the statute, and shall be subject

to all the conditions and provisions hereof, and to eviction and removal, forcible or otherwise, with or without process of law, as above stated."

"It is claimed by the petitioners that inasmuch as the verbal agreement to advance money to meet the pay rolls became engrafted upon the original lease and constituted a modification of it, that the failure to furnish sufficient coal to pay advances made, constitutes a breach of the contract which permits a cancellation of the lease, and that the Trustees in bankruptcy should be compelled to pay the full amount due on the advances made to the Mount Carmel Coal Company, or that petitioners be permitted to exercise their option on cancelling the contract.

"Expressed in the language of the petition, the claim and prayer of petitioners are as follows:

"That by reason of said failure to comply with the provisions of said contract and the delivery of coal, the said The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and Cherokee & Pittsburg Coal & Mining Company are entitled to declare said contracts and leases forfeited and void, and are entitled to the possession of the property covered by said lease, unless the receivers appointed in said bankruptcy proceedings are directed and instructed to deliver to said The Atchison, Topeka & Santa Fe Railway Company coal in an amount sufficient to liquidate the indebtedness created as aforesaid.

"Your petitioners therefore pray that J. E. Hurley, Cyrus Leland and Walter Reeves, Receivers appointed in the above entitled proceeding in bankruptcy, be directed either to deliver to said The Atchison, Topeka & Santa Fe Railway Com-
6 pany an amount of coal sufficient to carry out the provisions of the contracts hereinbefore set forth, as modified by the verbal contract between the said Mount Carmel Coal Company and The Atchison, Topeka & Santa Fe Railway Company, as hereinbefore set forth; or that said receivers be ordered and directed to deliver over the possession of all the lands and properties described in said written contracts hereinbefore set forth, upon the payment to said receivers of the amount provided to be paid to said Mount Carmel Coal Company under the terms of said leases, and that the property of said Mount Carmel Coal Company, for which said payment is made, be at the same time turned over to said Cherokee & Pittsburg Coal & Mining Company, The Osage Carbon Company and The Atchison, Topeka & Santa Fe Railway Company, in full compliance with the terms and provisions of said contracts.

"It is also claimed by petitioners that there are strong equities in their favor, which should be given consideration by the court, [frowing] out of the fact that the assistance given by them prevented the closing down of the mines and consequent disasters, and that the rights of the creditors were protected and the possibilities of receiving dividends greatly increased thereby.

"The advances made by the Santa Fe Company which are before the court for consideration, are three in number and were made under the following circumstances:

"First. On April 15, 1905, the account of the Mount Carmel Coal Company with the Santa Fe Company was overdrawn to the extent of $24,63.16. The Santa Fe Company had paid to the Coal Company that much more than it was entitled to receive on account of coal delivered. In order to settle this account the Coal Company gave to the Santa Fe Company two drafts, with the understanding that if the drafts were not paid they would be charged against the amounts due it for coal for the next month. One draft was for $10,000 and the other for $14,063.16. The $10,000 draft was paid on June 19, 1905. The other draft was extended until July 1st, upon the promise of the Coal Company to pay it upon that day. It was not paid upon that date and Mr. Devlin, President of the Coal Company, was informed sometime between July 1st and July 28th that the amount of it would be charged against the proceeds from coal due the Mount Carmel Coal Company. The charge against its accounts was actually made on July 29th, 1905, The moneys advanced the Mount Carmel Coal Company, which constitute the aforesaid item of $24,063.16, were advanced in the manner heretofore stated, for the purpose of enabling the Mount Carmel Coal Company to meet its payrolls. Just when they were made is not disclosed by the testimony.

"Second. On May 23, 1905, $20,280.00 was advanced the Mount Carmel Coal Company by the Santa Fe Company to enable it to meet its payrolls. The advance was to be paid by July 1905 coal vouchers. The Testimony [us] uncertain as to whether the money was paid direct to the Coal Company or whether it was to be [ised] to take up a note due the National Bank of Commerce at Kansas City, and a new note given by the Coal Company to the bank to raise the necessary funds to meet its payrolls.

"A question propounded to Mr. Wellman and his answer thereto, found on page 15 of the transcript of testimony, would indicate that the money was used to take up some obligation. They are as follows:

"Q. Why do you say this $20,280 was money obtained and used by Mr. Devlin on May 23rd?

"A. Because Mr. Devlin represented to us that if
131 he took up that obligation he could get his money for the payroll"

"Third. The third item amounting to $33,247.50, was advanced to the Coal Company to take up a note for that amount due the American National Bank of Kansas City. This was done to enable the Coal Company to borrow a similar amount from the bank to meet its payrolls. The money was paid to the bank and the note taken up on July 3, 1905. The note was turned over to the Santa Fe Company by the bank and it is now in possession of that company.

"Various credits have been allowed against these advancements, as appears by an exhibit attached to the petition, reducing the amount of petitioners' claim to $57,304.16."

At the oral argument and in the written briefs filed on behalf of petitioners any and all claim of subrogation to the rights of the miners whose demands were paid off and discharged out of the money advanced by the railway company is disclaimed by petitioners. Also, any and all right of petitioners to preferential payment of the money so advanced out of the bankrupt estate is as expressly and positively disclaimed. The sole insistence of petitioners in this court is, that as between the bankrupt and the petitioners the written contract was, before the institution of the proceedings in bankruptcy, modified by an oral agreement entered into when the money was advanced, that the bankrupt was in the months of July and August 1905, to deliver to the railway company coal at the prices named in the contract sufficient in amount to discharge the obligation incurred by the bankrupt to the railway company on account of the advances made; that such oral modification entered into and formed a part of the contract between the parties at the date of the institution of the bankruptcy proceedings in this court and the appointment of the receivers. Therefore, it is contended equity will not permit the trustees to now assume and carry out the terms of the contract as it stands written because by them deemed beneficial to the bankrupt estate, but that if the trustees elect to assume performance of the contract at all they must undertake it with all its burdens and must either furnish the coal agreed to be furnished by the bankrupt to the railway company in accordance with the
132 terms of the claimed oral modification of the agreement, or forfeit all rights under the lease and surrender the leased premises to petitioners, and it is so prayed.

The referee on full hearing and consideration of the matter was of the opinion the agreements under which the sums of money advanced by the railway company were

furnished, were separate undertakings not entering in or forming a part of the written agreement, and in consequence the receiver and trustees might assume and perform the obligation of the written contract without assuming or obligating the estate or themselves to mine and furnish the coal claimed by the railway company in payment of the advances made. And their failure or refusal to so do does not work a forfeiture of the right to demand performance of the terms of the written contract by the coal companies and the railway company. The decision of the referee on the facts stated is as follows:

"I am unable to find any testimony indicating an intention to modify the written lease as claimed by petitioners. There certainly was no express oral agreement to that effect. It is true, the advances were to be paid by money due the Coal Company for coal furnished the Santa Fe Company, and the money, instead of being paid under the terms of the written contract, would be kept to reimburse the Santa Fe Company for money advanced. But this amounts to the same thing as saying that the Santa Fe Company merely paid for its coal in advance, although not required to do so by the terms of the contract. I cannot construe this to mean that the written contract was necessarily modified by the agreement to advance moneys to meet the pay rolls. I regard the verbal agreement as a separate, independent, parol contract, in no respect inconsistent with the written contract. I am of the opinion that it did not become a part of the main contract by express agreement or necessary implication, and that the Santa Fe Company is not entitled to a cancellation of the lease on account of a failure to furnish coal to pay advances made, to meet pay rolls.

"Although there are equities in favor of petitioners' claim, by reason of having advanced money to meet pay rolls and keep the Mount Carmel Company a going concern, I can find nothing in the law which will justify the court in giving the claim priority over those of other creditors.

"It must be apparent that the advances were for the benefit of the Santa Fe Company as well as the Mount Carmel Coal Company. It was important that it be kept supplied with coal to operate its road, and the shutting down of these mines might have caused embarrassment to the Santa Fe Company. Furthermore, its interest in the mining properties leased to the Mount Carmel Company was protected by keeping the
133 property in operation.

"The testimony also shows that the advancements were made in accordance with a practice which had been followed for a considerable time.

"An order will be entered denying the relief prayed for by the petitioners.

"All objections made by the attorney for the Trustees, where ruling was reserved, are overruled."

From a careful reading of the record in this matter and consideration of the briefs and argument of solicitors, in my judgment the conclusion reached by the referee is right and should be confirmed, and this for many reasons. First, I am of the opinion the transactions by which the money was advanced by the treasurer of the railway company to the bankrupt were completed transactions, by reason of which the bankrupt became indebted to the railway campany for so much money, and that such transactions are wholly independent of, separate and apart from the original contract between the parties. True, at the time the sums of money were advanced it was no doubt contemplated and agreed by the parties that the bankrupt would repay the money by furnishing coal at the price of the coal measured in money by the terms of the contract and would furnish such coal in the months of July and August as claimed. But at the time of the failure of the bankrupt the coal remained in the ground, unmined. None had been raised and none set apart as a fund to pay the debt. The contracts under which the money was advanced created no lien upon any property for its repayment. The railway Company simply advanced to the bankrupt company money to enable it to meet its engagements arising out of the transaction of its business and charged interest thereon to be settled and paid in coal at a future date and at a fixed price. It is not contended any agreement was made by which the railway company bound itself to make like advances in future should the occasion arise. The transaction in its legal significance is not different from that had a bank or other person furnished the money, taken the obligation of the bankrupt to repay at a certain time with interest.

In such case the bank would have a perfect legal de-
134 mand for repayment of the money but would be simply a contract creditor of the bankrupt, holding a general unsecured claim against the estate in the hands of the receivers or trustees.

Again, it is well settled, "An adjudication of bankruptcy absolves the bankrupt from no agreements, terminates no contracts and discharges no liability. * * Its effect is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these. * * * His trustee does not become liable for his debts, but he does acquire the right to

accept and assume or to renounce the executory agreements of the bankrupt, as he may deem most advantageous to the estate he is administering, and the parties to those contracts which he assumes are still liable to perform them." This is the language of Judge Sanborn delivering the opinion in Watson V. Merrill, 136 Fed. 359.

The order appointing receivers in this case authorized them to borrow sufficient funds to meet the pay rolls of miners wages then presently due in order that the operation of the mines in question should not cease to the detriment of the estate, the railway company and coal companies as well. This was done, and receivers notes creating a paramount lien on all the estate of the bankrupt were authorized and issued and thus the grounds for forfeiture specified in the written lease were avoided. The trustees represent both the secured and unsecured creditors. To now hold the oral agreement made between the bankrupt and the railway company, (unknown to the receivers and the court at the time of their appointment) entered into and formed a part of the written contract of lease, requiring the money raised by order of court to be employed in the production of coal to meet the claims of petitioners now made, or that the contract thus sought to be perpetuated for the benefit of the estate of the bankrupt, and petitioners as well,
135 should be forfeited, would be, to my mind, so manifestly unjust to the creditors of the bankrupt, and particularly the secured creditors, as to require its denial on the ground of natural justice.

Again, as has been seen from the facts stated, the written agreement of lease made among the parties definitely and positively specifies the acts of omission or commission which shall work a forfeiture of the lease, and also definitely and positively states the time and manner in which such forfeiture shall be declared and enforced by the party or parties injured by the default of the other. It is now sought by petitioners not alone to engraft upon the written lease a new contract or agreement between the parties of which no mention is made in the writing, but also by reason of the breach of such new obligation thus created to have the court order a performance of the obligation which would work a preference in favor of the railway company over the other creditors of the bankrupt, (the right to which preference is by the railway company expressly disclaimed) or to decree a forfeiture of the lease on a ground neither specified therein in writing nor claimed to have been made as a part of the oral agreement. To my mind this may not be done, and for this reason. Suppose for the sake of argument the agreement made between the railway company and the bankrupt to repay the advances made in coal in future at the rate specified in the contract had by consent of all the

parties thereto been endorsed upon or written into the lease, and this obligation had from that time forth formed a part of the written lease, and as in this case had not been performed by the receivers or trustees, would such failure be ground for forfeiture of the lease? I think not. In the making of the lease as written, the parties agreed the breach of certain conditions therein stated should work a forfeiture. It was not agreed at that time any money should be advanced by
136 the railway company to the bankrupt to be repaid in future in coal, hence of necessity it was not agreed a failure to so repay any advances made would work a forfeiture of the lease. When such agreement for advances was subsequently made no forfeiture for failure of performance of this new covenant was expressly stipulated among the parties, and none can be implied. It would simply be a new and independent agreement or covenant engrafted on the lease, the breach of which would have rendered the bankrupt liable to an action by the railway for repayment, had bankruptcy proceedings not intervened, but would not be such a breach of condition as would work a forfeiture of the entire lease as to all parties, because it was not so stipulated and agreed.

In 18 A. & E. Encycl. of L., 2d ed. 369, it is said:

"The common-law rule is well settled that a breach by the lessee of his covenants or agreement in the lease does not work a forfeiture of the term in the absence of an express stipulation in the lease or the reservation of a power of re-entry in case of such breach. The general remedy of the lessor in such a case is merely by action for the recovery of damages. This rule applies with regard to implied covenants; express covenants, to pay rent; covenants to pay taxes; covenants not to assign or sublet."

In re Hague v. Ahrens, 53 Fed. 58, it is said:

"The law regards conditions with the same disfavor it does forfeitures; and for similiar reasons. A clause will not therefore be treated as a condition of it can be construed a covenant without violence to its terms. If the purpose to create a condition or conditional limitation, is not expressed in clear, unequivocal language—as the courts have frequently said in "apt terms", such as "upon condition", "provided nevertheless," "so long as," "during," etc.—the clause will be treated as a covenant, simply. The provision under consideration does not contain such language. The terms, "This lease shall not be sold, assigned, or transferred, without the written consent of the party of the first part," convey no suggestion even that the leave may be lost by such transfer. They express simply an agreement by the lessee, who alone could make the trans-

fer, that he will not do it. If the lessor was not satisfied with the remedy which the law affords for breaches of such agreements he should have stipulated for another by adding terms of condition or forfeiture. That he knew very well how to do this, and had it in mind, as respects breaches of other provisions of the lease, is shown by the following clause: "A failure to pay the money after demand made, or put down the well, as hereinafter stipulated, shall forfeit this lease within one year from the date hereof." The inference is strong, therefere, that he did not contemplate similar consequences as the result of a transfer."

To like effect is In re Pennewell, 119 Feb. 139; Doe
137 v. Godwin, 4 Maule & S. 265; Crawley v. Price, L. R. 10 Q. B. 302; Den v. Post, 25 N. Y. Law, 285; Spear v. Fuller, 8 N. H. 174; Wheeler v. Dascomb, 3 Cush. 285; 1 Washb. Real Prop. sec. 504.

In the light of these authorities, I am persuaded, had the subsequent independent contracts for advancements made entered into and formed a modification of the original lease, as claimed by petitioners, its non-performance by the bankrupt or the failure of the receivers or the trustees to perform in accordance with its terms would not work a forfeiture of the lease, because the parties at the time of the making of the lease expressly stipulated the breach of what conditions therein written should work a forfeiture of the lease, and made no stipulation regarding the advancement of money by the railway company to the bankrupt as was thereafter done. When the new agreement for such advancements was made it was not then stipulated the failure to repay such advances according to the terms of the subseduent agreement should work a forfeiture of the lease.

It follows, the decision of the referee is right and must be approved. It is so ordered.

No. 816. In Re Mount Carmel Coal Co., Decision Filed March 5th 1906. Morton Albaugh clerk, by F. L. Campbell, Deputy.

In the District Court of the United States for the Dis-
138 trict of Kansas First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt, on petition of The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company. In Bankruptcy.

Petition for Appeal.

The above named The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee

& Pittsburg Coal and Mining Company, conceiving themselves aggrieved by the decree rendered against them on this 12th day of March, 1906, in favor of Cyrus Leland Jr., J. E. Hurley and Walter Reeves, Receivers and Trustees in Bankruptcy of the Mount Carmel Coal Company on the petition of said petitioners filed in the above-entitled cause and matter, do hereby appeal from said order, judgment, ruling and decree of the District Court of the United States for the District of Kansas, First Division to the United States Circuit Court of appeals for the Eighth Circuit, for the reasons specified in the assignments of errors which is filed herewith; and the said The Atchison Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company pray that this appeal may be allowed and that a transcript of the record, proceedings and papers in which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit. In the meantime all proceedings are stayed upon the execution of bond in the sum of five hundred dollars to be approved by the Judge of said Court.

WM. R. SMITH,
O. J. WOOD,
Attorneys for The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company.

ROBERT DUNLAP,
Of Counsel.

Now, to-wit on this 12th day of March, 1906, it is ordered that the appeal be allowed as above prayed for.

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JOHN C. POLLOCK,
District Judge.

Endorsed: No.816. In Re The Mount Carmel Coal Company, Bandrupt. Petition for Appeal. Filed March 12th, 1906.

MORTON ALBAUGH, Clerk.
By B. L. CAMPBELL, Deputy Clerk.

140 In the District Court of the United States for the District of Kansas First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt, on petition of the Atchison, Topeka and Santa Fe Railway Company, the Osage Carbon Company, and The Cherokee & Pittsburg Coal and Mining Company.

In Bankruptcy.

## Assignment of errors of Appeal.

And now on this 12th day of March, A. D. 1906, come The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, by Robert Dunlap, O. J. Wood and Wm. R. Smith, their Solicitors and allege and say that the order, judgment and decree in favor of Cyrus Leland, Jr., J. E. Hurley and Walter Reeves, receivers and later trustees in bankruptcy of the Mound Carmel Coal Company, Bankrupt, heretofore rendered in said cause on the petition of said petitioners, is erroneous and against rights of the said The Atchison, Topeke and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company for the following reasons. to-wit:

1. That the District Court of the United States for the District of Kansas, First Division, erred in holding that under the evidence the said petitioner, The Atchison, Topeka and Santa Fe Railway Company was not entitled to have delivered to it by the receivers and trustees in bankruptcy of said Mount Carmel Coal Company coal to the amount and value of $57,304.16 on account of the agreement made before said receivership between the said Mound Carmel Coal Company and the said The Atchison, Topeka and Santa Fe Railway Company.

2. That the said District Court erred in holding that
141 The Atchison, Topeka and Santa Fe Railway Company did not have an equitable right under the agreement made with it by the said Mount Carmel Coal Company to have an order made by said Court for the delivery to said Railway Company of coal to the amount of $57,304.16 for moneys to that amount advanced to said Mount Carmel Coal Company by said Railway Company, which said coal was agreed to be furnished to satisfy said advances made to said Mount Carmel Coal Company before its adjudication in bankruptcy.

3. That the Court erred in holding that there was no testimony indicating an intention to modify the written lease and contract to the extent that the advances made by the Railway Company to the Mount Carmel Coal Company were to be paid by the latter company in coal.

4. That the Court erred in holding that the verbal agreement between The Atchison, Topeka and Santa Fe Railway Company and the Mount Carmel Coal Company was seperate and independent from the contract and lease set out in the petition filed before the referee herein and contained in the record.

5. That the District Court erred in holding that the written lease and contract under which the receivers and trustees took possession of the coal mines operated by the Mount Carmel Coal Company before the receivers was not charged with the payment of the amounts paid by the petitioner, The Atchison, Topeka and Santa Fe Railway Company to the Mount Carmel Coal Company to satisfy its pay-rolls and to keep the mines described in said lease in a running condition.

6. That the District Court erred in denying the relief prayed for by the petitioners herein in their petition filed before the referee, which was that the said amount of money so advanced by the said The Atchison, Topeka and Santa Fe Railway Company should be paid to it in full by the delivery of coal by said receivers and trustees, or that the receivers and trustees be ordered and directed to deliver over the possession of all lands and properties described in said written contracts set forth in the petition, to the grantors and lessors mentioned and described in said contract.

7. That the said District Court erred in not ordering the said receivers and trustees in bankruptcy to turn over to the petitioners the property mentioned in the lease and contract contained in the record herein after said Court had decided that said The Atchison, Topeka and Santa Fe Railway Company was not entitled to be paid in full for the advances made by it to the Mount Carmel Coal Company by delivery of coal.

8. That the said District Court erred in denying and refusing to sustain the various assignments of error numbered one to six both inclusive, filed before N. H. Loomis, Special Referee in Bankruptcy.

9. That the said District Court erred in sustaining, affirming and approving the findings and report of the said N. H. Loomis, Special Referee in Bankruptcy,

10. That the said District Court erred in not setting aside and reversing the findings, conclusion and report of N. H. Loomis, Special Referee, to the effect that the petitioners are not and were not entitled to the relief prayed for in their petition filed before said referee.

Wherefore, Said petitioners, The Atchison, Topeka and Santa Fe Railway Company, the Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company, pray that the said order, findings and decree be reserved and that said District Court may be directed to enter a decree
143 against the said Cyrus Leland Jr., J. E. Hurley, and Walter Reeves, receivers and trustees in bankruptcy of

the Mount Carmel Coal Company and in favor of The Atchison, Topeka and Santa Fe Railway Company.

ROBERT DUNLAP.
Of Counsel.

WM. R. SMITH,
O. J. WOOD,
Solicitors for the Atchison, Topeka and Santa Fe Railway Company.

Endorsed: No. 816. In Re The Mount Carmel Coal Company, Bankrupt. Assignment of Errors. Filed March 12th, 1906. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

144 In the District Court of the United States for the District of Kansas, First Division.

In the Matter of the Mount Carmel Coal Company, Bankrupt, on Petition of The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and The Cherokee & Pittsburg Coal and Mining Company.

In Bankrupcy.

Supersedeas Bond.

Know all men by these Presents, that The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and The Cherokee & Pittsburg Coal and Mining Company as principals and W. A. L. Thompson, of Topeka, Kansas, as surety, are held and firmly bound unto Cyrus Leland Jr., J. E. Hurley and Walter Reeves, Receivers and Trustees in Bankruptcy of The Mount Carmel Coal Company in the sum of five hundred dollars ($500.00) to be paid to said receivers and trustees as their interest may appear, to which payment well and truly to be made we bind ourselves jointly and severally and each of our successors and assigns jointly by these presents.

Dated this 10th day of March, 1906.

Whereas, the above named The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and The Cherokee & Pittsburg Coal and Mining Company have prosecuted their appeal to the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the final order, judgment and decree rendered in the above entitled matter and proceeding in favor of said Cyrus Leland Jr., J. H. Hurley and Walter Reeves, Receivers and Trustees in Bankruptcy of the Mount Carmel Coal Company, by the District Court of the United States, for the District of Kansas, First Division.

Now, therefore, the condition of this obligation is that if the above-named, The Atchison, Topeka and Santa Fe
145 Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company, shall prosecute their appeal to effect and pay all costs and damages that may be adjudged and awarded before them if they shall fail to make their appeal in this obligation, otherwise in full force.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COMPANY AND THE CHEROKEE & PITTSBURG COAL AND MINING COMPANY.

By Wm. R. Smith,
their agent and attorney.
W. A. L. Thompson.

Taken and approved by me this 12th day of March, 1906.

JOHN C. POLLOCK, Judge.

Endorsed: No. 816. In Re the Mount Carmel Coal Company, Bankrupt. Bond. Filed Mar 12, 1906. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

146 In the District Court of the United States, for the District of Kansas, First Division.

In re Mount Carmel Coal Company, bankrupt.

On petition of the Atchison, Topeka and Santa Fe Railway Company, the Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company.

Stipulation.

It is agreed and stipulated between the Atchison, Topeka and Santa Fe Railway Company, a corporation, and James E. Hurley, Cyrus Leland, Jr., and Walter Reeves, trustees in bankruptcy of the above-named bankrupt (heretofore receivers) for the purpose of shortening the record in this case, that on September 26th, 1905, the said Mount Carmel Coal Company, a corporation, was, by involuntary proceedings against it, adjudged a bankrupt, and that the said above-named persons were duly elected and appointed trustees of the estate of said bankrupt corporation on December 19th, 1905.

The Atchison, Topeka and Santa Fe Railway Company, et al.

By WM. R. SMITH,
Its attorney.

JAMES E. HURLEY,
CYRUS LELAND, Jr., and
WALTER REEVES,
Trustees.

By J. S. DEAN,
Their attorneys.

Endorsed, filed March 27, 1906. Morton Albaugh, clerk. by F. L. Campbell, Dept. Clerk.

United States of America,
147 District of Kansas —ss.

I, Morton Albaugh, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in case No. 816, in the matter of the Mount Carmel Coal Company, bankrupt, in bankruptcy, on petition of the Atchison, Topeka & Santa Fe Railway Company and others.

I further certify that the original citation is hereto attached and returned herewith.

Seal of U. S. District Court Dist. of Kansas.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 28th day of March, A. D. 1906.

MORTON ALBAUGH,
Clerk.

Filed April 12, 1906, John D. Jordan, Clerk.

(*Appearance of Counsel for Appellants.*)

On the twelfth day of April, A. D. 1906, an appearance of counsel for appellants was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2424.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
Appellants,
*vs.*
J. E. HURLEY ET AL., Trustees, &c.

The Clerk will enter my appearance as Counsel for the Appellants.

ROBERT DUNLAP.
WM. R. SMITH.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2424. Atchison, Topeka and Santa Fe Ry. Co., *et al.*, Appellants, *vs.* J. E. Hurley, *et al.*, Trustees, &c. Appearance. Filed Apr. 12, 1906. John D. Jordan, Clerk. Robert Dunlap, William R. Smith, Counsel for Appellants.

(*Appearance of Mr. Clifford Histed as Counsel for Appellees.*)

And on the twenty-eighth day of June, A. D. 1906, the appearance of Mr. Clifford Histed, as counsel for appellees, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2424.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
Appellants,
*vs.*
J. E. HURLEY ET AL., Trustees, &c.

The Clerk will enter my appearance as Counsel for the Appellees.

CLIFFORD HISTED.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2424. Atchison, Topeka & Santa Fe Ry. Co., *et al.*, Appellants, *vs.* J. E. Hurley, *et al.*, Trustees, &c. Appearance. Filed Jun. 28, 1906. John D. Jordan, Clerk. Clifford Histed, Counsel for Appellees.

(*Appearance of Mr. John S. Dean as Counsel for Appellees.*)

And on the second day of July, A. D. 1906, the appearance of Mr. John S. Dean, as counsel for appellees, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2424.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., Appellants,
*vs.*
J. E. HURLEY ET AL., Trustees, &c.

The Clerk will enter my appearance as Counsel for the Appellees.
JOHN S. DEAN.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2424. The Atchison, Topeka and Santa Fe Ry. Co., *et al.*, Appellants, *vs.* J. E. Hurley, *et al.*, Trustees, &c. Appearance. Filed Jul- 2, 1906, John D. Jordan, Clerk. John S. Dean, Counsel for Appellees.

(*Argument Commenced.*)

And on the tenth day of December, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an entry in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1906.

MONDAY, *December* 10, 1906.

No. 2424.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., Appellants,
*vs.*
J. E. HURLEY ET AL., Trustees, &c.

Appeal from the District Court of the United States for the District of Kansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Robert Dunlap in behalf of the appellants, but the hour of adjournment having arrived before the conclusion thereof, the further hearing of this cause was postponed until tomorrow morning.

(*Order of Submission.*)

And on the eleventh day of December, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1906.

TUESDAY, *December* 11, 1906.

No. 2424.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., Appellants,
*vs.*
J. E. HURLEY ET AL., Trustees, &c.

Appeal from the District Court of the United States for the District of Kansas.

This cause having been called for further hearing, argument was continued by Mr. Robert Dunlap for the appellants and by Mr. John S. Dean for the appellees and concluded by Mr. Robert Dunlap for the appellants.

Thereupon the cause was submitted to the Court upon the transcript of record from said District Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twentieth day of March, A. D. 1907, an opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2424, December Term, A. D. 1906.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., Appellants,

*vs.*

J. E. HURLEY, CYRUS LELAND, JR., and WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Bankrupt, Appellees.

Appeal from the District Court of the United States for the District of Kansas.

Mr. Robert Dunlap (Mr. Wm. R. Smith and Mr. Gardiner Lathrop were with him on the brief) for appellant.
Mr. John S. Dean for appellees.

Before Sanborn, Hook and Adams, Circuit Judges.

ADAMS, *Circuit Judge*, delivered the opinion of the court:

This was an appeal from an order of a court of bankruptcy in the District of Kansas denying to the Atchison, Topeka & Santa Fe Railway Company a claim for a preference against the assets of the Mt. Carmel Coal Company, bankrupt, or the alternative relief prayed for.

In 1896 the Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, as parties of the first part, Charles J. Devlin as party of the second part and the Railway Company as party of the third part entered into an agreement whereby the parties of the first part leased for certain rents and royalties reserved, to Devlin for a term of three years certain coal lands situate in the State of Kansas with the right to mine coal therefrom, and the party of the second part agreed to sell and deliver to the Railway Company and the latter to buy from him daily all the coal required by it in the operation of certain of its lines of railroad in the State of Kansas at the prices stated in the lease, the same to be paid for by the Railway Company on the 15th day of each month for all coal delivered to it during the preceding calendar month. Power was conferred upon the Railway Company to terminate the lease for failure by Devlin to perform any of his undertakings, and the right to assign the lease was made subject to the consent of the Railway Company.

Subsequently, Devlin duly assigned to the Mt. Carmel Coal Company all his rights under the lease. By two successive agreements between the latter Company and the other parties to the lease the same was extended with slight modification, unimportant now to mention, subject to all its original terms and conditions, until June, 1906. All the parties continued in the performance of their

respective obligations until July, 1905, when the Mt. Carmel Company was adjudicated a bankrupt. Receivers were duly appointed and authorized to conduct the business of the bankrupt in the usual course, until trustees should be chosen. The receivers and subsequently appointed trustees successively continued to operate the mines under orders of the court and in the language of the court below, "performed fully the terms of the contract as it is written with the Coal Company and the Railway Company."

While the receivers were in charge the Railway Company and the two Coal Companies, the original lessors, filed their joint intervening petition, setting forth their relations with the bankrupt under the contract of 1896 as extended, their rights thereunder as already stated and, in substance, that by an agreement had between them and the bankrupt the contract had been modified to the extent that the Railway Company had agreed that without waiting until the 15th day of the month to make its payment for coal theretofore purchased, it would, in order to accommodate the bankrupt and enable it to pay off laborers and keep the mines going, make advance payments from time to time when necessary for those purposes, for coal thereafter to be delivered under and pursuant to the terms of the contract; that pursuant to that agreement and for the purposes stated, it had advanced $57,304.16 to the bankrupt with the understanding that it should be repaid by the delivery of coal under the contract, during the months of July and August, 1905; that the intervening bankruptcy proceedings of July 7th and the appointment of the receivers by the court alone prevented the bankrupt from carrying out its obligation and delivering the requisite coal to it.

The petitioners prayed that the lease be declared forfeited and void and the mines delivered back to them or that the receivers be directed to deliver to the Railway Company the amount of coal so paid for in advance by it. The intervening petition was referred to a referee who heard the proof and reported unfavorably to granting any relief, and his report was afterwards confirmed by the District Judge and the petition dismissed. The facts are not materially controverted.

The referee found and reported the amount claimed by the Railway Company, $57,304.16, had been advanced in the way shown by the proof, to enable the bankrupt to meet its pay rolls. He concluded as follows:

"I am unable to find any testimony indicating an intention to modify the written lease. There certainly was no express oral agreement to that effect. It is true the advances were to be paid by money due the Coal Company for coal furnished the Santa Fe Company, and the money instead of being paid under the terms of the written contract would be kept to reimburse the Santa Fe Company for money advanced."

The court in reviewing the action of the referee said:

"True, at the time the sums of money were advanced it was no doubt contemplated and *agreed by the parties that the bankrupt*

*would repay the money by furnishing coal at the price of the coal measured in money by the terms of the contract and would furnish such coal in July and August as claimed*, but at the time of the failure of the bankrupt the coal remained in the ground unmined."

From these facts the referee concluded that the verbal agreement was a separate independent parol contract and had nothing to do with the original contract as evidenced by the lease, and the court in affirming the referee's conclusion observed as follows:

"I am of opinion that the transactions by which the money was advanced by the treasurer of the Railway Company to the bankrupt were completed transactions by reason of which the bankrupt became indebted to the Railway Company for so much money and that such transactions are wholly independent of and separate and apart from the original contract between the parties. * * * The contracts under which the money was advanced created no lien upon any property for its repayment." * * *.

The supplemental agreement whereby provision was made for advance payments for coal to be thereafter delivered under the lease may or may not be properly called a modification of the original agreement. That is immaterial. What we are concerned about is not its name but its meaning, that is: what was the intent and purpose of the parties in making it. In arriving at such intent and purpose we should consider the situation of the parties and the facts and circumstances surrounding them in the light of which, and to effect which, the supplemental agreement was made. The clear intent and purpose of the main contract, so far as the Railway Company is concerned, was to make a reliable provision in advance for its daily necessities for a period of years,—a provision so important to the Railway Company itself and to the travelling public that it saw fit to secure and make it certain by stipulations giving it the right to veto any assignment of the lease or to declare a forfeiture of all the Coal Company's rights under the lease if it failed to observe its contract obligations. It appears that the Coal Company, while the contract was still in force and being executed, became embarrassed and unable to meet its payrolls; as a result it might not be able to mine or deliver the coal which it had agreed to mine and deliver to the Railway Company, and which the latter imperatively required for its daily consumption. In this state of things the Railway Company agreed to waive its right to withhold payment for fifteen days after coal was delivered to it and pay for some of it before it was delivered; and the Coal Company agreed, as found by the trial court, to repay such advances, not in money, but by furnishing coal in the months of July and August following, at the price fixed by the original contract. This arrangement made when the Coal Company was in embarrassed circumstances and obviously inspired by the necessity of meeting the payrolls and for the ultimate purpose of securing performance of the only part of the original contract in which the Railway Company was interested, namely: securing its supply of coal, is so intimately and vitally related to the original contract that we are unable to agree with the trial court

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that it was intended to be independent and separate from it. It was not, in our opinion, a modification of any of the substantive provisions of the contract, but was a change rendered necessary by subsequent events in the method of its execution only. It was an arrangement in no manner inconsistent with any of the provisions of the original contract, but only in aid of its execution.

The contract after the new arrangement remained as before. The Coal Company still had a right to mine coal on the same terms and conditions as before and was bound to supply the daily needs of the Railway Company as before. The money paid in advance entitled the Railway Company to an amount of coal which the money so advanced would pay for according to the terms of the original contract. We think the inevitable meaning of the new arrangement interpreted in the light of the conditions surrounding the parties and as necessarily intended by them was to pledge a sufficient amount of coal after it should be mined as security for the payment of advances made. This result is not expressed in the conventional form of a mortgage or pledge but the method of producing it was devised for the purpose of acquiring the needed money by the Coal Company and of furnishing security for its repayment. If the parties intended the arrangement to be one for borrowing and securing the repayment of money, we ought, as between them, to so regard it and to treat it as creating an equitable charge or lien, however inartificially it may have been expressed.

We cannot conceive it possible that the Railway Company with all the machinery for self-protection and security afforded by the original contract would, when the Coal Company became embarrassed financially, surrender that protection and security and voluntarily loan to the insolvent, money to produce its coal without any security whatsoever. Accordingly, we cannot agree with the learned trial court that the parties intended the advances to be independent transactions disconnected from the original lease and resulting only in simple contract debts or unsecured loans to the Coal Company. On the contrary, we think, as already stated, that the parties intended to appropriate and pledge to the Railway Company sufficient coal when mined to repay the advances made by it.

In the case of Fourth Street Bank *v.* Yardley, 165 U. S. 634, the facts were that the Keystone Bank solicited and received from the Fourth Street Bank $25,000 of gold certificates, agreeing to give its check against its reserve in the Tradesmen's National Bank therefor. Instead of doing so it gave in the exeution of the transaction a check against its general account in the last mentioned bank. The draft was duly presented for payment and payment was refused. It was held in the case which was brought to subject moneys in the hands of the receiver of the Keystone Bank to an equitable charge or lien in favor of the Fourth Street Bank, that inasmuch as it was the intention and agreement of the parties that the check drawn generally should be paid out of a particular fund, such check, as between the parties, should be treated as an equitable assignment

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of that fund to the extent necessary to pay the check. In its opinion the Supreme Court made the following observations:

"When we look at the situation of the parties and the character of the transaction disclosed by the facts just referred to, no difficulty is experienced in ascertaining the intent of the parties. Both were banking institutions—banks of deposit. They were located in the same city. * * * It cannot be doubted that a mere request for the loan by the Keystone Bank from the Fourth Street Bank would have been so surprising that the contract would not possibly have been made without a statement of the reason which rendered the request necessary. * * * The deduction arises that, as it cannot be reasonably conceived that the loan would have been made without reference to an assignment of the particular fund from which alone the hope of immediate payment was to be reasonably expected, the parties must have and did intend to create a particular appropriation, charge or lien on the property upon the faith of which they both dealt. * * * It is of course true that the method adopted to evidence the appropriation" (by the Keystone Bank) "was a check drawn generally upon the Tradesmen's Bank, but, as already stated, the authorities are clear that when it is established that it was the intention and agreement of the parties to a transaction that a check drawn generally should be paid out of a particular fund, such check, as between the parties, will be treated as though an order for payment out of a specific, designated fund."

To the same effect are the following cases: Hauselt *v.* Harrison, 105 U. S. 401; Carr *v.* Hamilton, 129 U. S. 252; Duplan Silk Co. *v.* Spencer, 53 C. C. A. 321, 115 Fed. 689; Erie R. C. *v.* Dial, 72 C. C. A. 183, 140 Fed. 689, and *In re* Cramond, 145 Fed. 976; Reeves *v.* Kimball, 40 N. Y. 299.

The foregoing are sufficient to show how far the courts have gone in declaring transactions, not made strictly in the conventional language of a mortgage or pledge, to be equitable charges in the nature of such mortgage or pledge, when it is necessary to do so in order to execute the intent and purpose of the parties.

It follows that if bankruptcy had not supervened the Railway Company could have enforced its claim for advances against the coal when mined by the Coal Company.

Does the bankruptcy of the latter Company deprive the former of the same remedy against the trustees?

The administration and distribution of the property of bankrupts is a proceeding in equity, (*In re* Rochford, 59 C. C. A. 388, 124 Fed. 182) and should be conducted on broad equitable lines with a view of recognizing and enforcing the rights of all parties claiming an interest in the estate, whether they be legal or equitable, or both. (*In re* Chase, 59 C. C. A. 629, 124 Fed. 753.)

The last cited case well expresses the broad and liberal spirit which pervades the bankruptcy act. It is there said by Circuit Judge Putnam in delivering the unanimous opinion of the Circuit Court of Appeals of the First Circuit, as follows:

"It is settled that a trustee in bankruptcy has no equities greater

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than those of the bankrupt and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant. Williams' Law of Bankruptcy (7th Ed.) 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

See to the same effect the following cases: Hutchinson *v.* Le Roy, 51 C. C. A. 159, 113 Fed. 202, 205; Hutchinson *v.* Otis, 53 C. C. A. 419, 115 Fed. 937, 940; Batchelder & Lincoln Co. *v.* Whitmore, 122 Fed. 355.

The trustees stand in the shoes of the bankrupt. Whatever rights a third party had against the property of a bankrupt before adjudication, that party, in the absence of fraud or fixed liens created by state statutes in favor of others, has against his estate in bankruptcy. Hewit *v.* Berlin Machine Works, 194 U. S. 296; Thompson *v.* Fairbanks, 196 U. S. 516; Humphrey *v.* Tatman, 198 U. S. 91; York Mfg. Co. *v.* Cassell, 201 U. S. 344.

In Thompson *v.* Fairbanks, the Supreme Court said:

"Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act."

In the light of these authorities we have no hesitation in holding that the equitable charge created by the parties before the bankruptcy of the Coal Company should be enforced against the estate in the hands of its trustees.

Counsel for the trustees contend that no lien, equitable or otherwise, was created by the subsequent agreement because it was not in writing and signed by the parties to be charged as required by section 3173 G. S. (Kas.), 1901, commonly known as the statute of frauds. We find it unnecessary to consider the interesting question debated at the bar whether the oral agreement was such a substantive modification of the original one as distinguished from a change in detail of performance, as required it to be in writing to conform to the statute in question. It sufficiently appears that the Railway Company fully performed its part of the agreement. It advanced the money as agreed but the Coal Company failed to repay it as agreed. Equity will not permit the statute of frauds to be invoked in favor of a party who has not performed his oral undertaking against one who, at his invitation and in reliance upon his promise has expended money and changed his situation. That would make the statute an instrument of fraud rather than a means to prevent it. It cannot be so employed. Swain *v.* Seamens, 9 Wall. 254;



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Brown on Stat. of Frauds, Secs. 457 to 460; Glass *v.* Hulbert, 102 Mass. 24, 36; Suggett's Adm'r. *v.* Carson's Adm'r., 26 Mo. 221; Winters *v.* Cherry, 78 Mo. 344, 349.

Another and conclusive answer to the trustees' contention in this case is found in their conduct on assuming the duties of their trust. They found an assignable executory contract in force between the bankrupt and the Railway Company; one that might be advantageous or disadvantageous to the estate. It was evidenced by writing but the parties had changed its mode of performance as already pointed out, so that as between them it consisted of the original instrument and the agreed modification.

It is well settled that trustees in bankruptcy are not bound to accept property or take over contracts which are onerous and unprofitable and which would burden rather than benefit the estate. In the execution of their trust they are confronted at the outset with the duty of electing whether to assume an existing executory contract, continue its performance and ultimately dispose of it for the benefit of the estate or to renounce it and leave the injured party to such legal remedies for the breach, as the case affords. American File Co. *v.* Garret, 110 U. S. 288, 295; Sparhawk *v.* Yerkes, 142 U. S. 1, 13; Sessions *v.* Romadka, 145 U. S. 29; Dushane *v.* Beall, 161 U. S. 515; Watson *v.* Merrill, 69 C. C. A. 185, 136 Fed. 359, 363; *In re* Chambers, Calder & Co., 98 Fed. 865; Mercantile Trust Co. *v.* Farmers Loan and Trust Co. 26 C. C. A. 383, 81 Fed. 254; Central Trust Co. *v.* Continental Trust Co. 30 C. C. A. 235, 86 Fed. 517.

If they elect to assume such a contract they are required to take it *cum onere*, as the bankrupt enjoyed it, subject to all its provisions and conditions, "in the same plight and condition that the bankrupt held it." York Mfg. Co. *v.* Cassell (*supra*), and cases *supra*.

Any valid modifications of a written contract which may have been made by the bankrupt before adjudication, whether oral or in writing, and whether known or unknown to the trustees, are binding upon them if they elect to assume and perform the contract. They take it subject to all equities between the original parties. Reeves *v.* Kimball, (*supra*); Wood *v.* Donovan, 132 Mass. 84; Homer *v.* Shaw, 177 Mass. 1; Mangles *v.* Dixon, 3 House of Lords Cases, 703. The duty rests upon the trustees to make inquiry and ascertain the true nature, character and conditions of the contract before exercising their election. When the election is made to assume it where no fraud has been practiced upon them, they stand in exactly the same situation as the bankrupt himself stood prior to the adjudication (cases *supra*).

After presumably making all the inquiries necessary to fully acquaint themselves as to the advisability of taking over the executory contract in question the trustees in this case determined to do so, assumed the contract and entered upon its execution. They mined coal, delivered it to the Railway Company, and, in the language of the trial court, "performed fully all the terms of the contract as it was written" but failed to conform to the condition created by the

oral agreement to deliver coal to the Railway Company in payment of the advances made by it to keep the mine going.

From the foregoing the conclusion follows that the learned trial court should have sustained the interveners' petition and surrendered to them the leased premises or required the trustees, upon the assumption of the lease, to perform the condition of mining and furnishing the Railway Company sufficient coal to cover its advances. Not having done so and the lease having expired so that it cannot now be done, the assets of the estate, consisting in part of money received for coal delivered to the Railway Company, should be subjected to the payment of such advances as a preferential claim. The decree is accordingly reversed and the cause remanded with instructions to proceed according to this opinion.

Hook, Circuit Judge, dissents.

Filed March 20, 1907.

(*Decree.*)

And on the twentieth day of March, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1906.

WEDNESDAY, *March* 20, 1907.

No. 2424.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COMPANY, and THE CHEROKEE AND PITTSBURG COAL AND MINING COMPANY, Appellants,

*vs.*

J. E. HURLEY, CYRUS LELAND, JR., and WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Bankrupt.

Appeal from the District Court of the United States for the District of Kansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee and Pittsburg Coal and Mining Company have and recover against J. E. Hurley, Cyrus Leland, Jr., and Walter Reeves, Trustees in Bankruptcy of the

Estate of The Mount Carmel Coal Company, Bankrupt, the sum of Two Hundred Seventy-Eight and 75/100 Dollars for their costs in this behalf expended.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to proceed in accordance with the views expressed in the opinion of this Court.

March 20, 1907.

(*Petition of Appellees for Allowance of Appeal to Supreme Court U. S., and Order Allowing Same.*)

And on the sixteenth day of April, A. D. 1907, a petition of appellees for the allowance of an appeal to the Supreme Court of the United States and order allowing same, was filed in said cause, in the words and figures following, to-wit:

In the Circuit Court of Appeals of the United States for the Eighth Circuit.

In Equity. # 2424.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., Appellants,

*vs.*

JAMES E. HURLEY, CYRUS LELAND, JR., and WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Appellees.

*Petition on Appeal.*

The above named appellees conceiving themselves aggrieved by the decree made and entered on the 20th day of March, 1907, in the above entitled cause, do hereby appeal from said order and decree to the United States Supreme Court, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States Supreme Court.

JOHN S. DEAN,
*Attorney for Appellees.*

The foregoing claim of appeal is allowed, conditioned upon the filing and approval of a bond in the sum of ——.

ELMER B. ADAMS,
*Judge of the U. S. Circuit Court of Appeals, 8th Circuit.*

(Endorsed:) No. 2424. The Atchison, Topeka and Santa Fe Railway Co., *et al.*, Appellants, *vs.* J. E. Hurley, *et al.*, as Trustees, etc. Petition of Appellees for allowance of appeal to Supreme Court, U. S., and order allowing same. Filed Apr. 16, 1907, John D. Jordan, Clerk.

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(*Assignment of Errors.*)

And on the sixteenth day of April, A. D. 1907, an assignment of errors was filed in said cause, in the words and figures following, to-wit:

In the Circuit Court of Appeals of the United States for the Eighth Circuit.

In Equity. No. 2424.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., Appellants,

*vs.*

JAMES E. HURLEY, CYRUS LELAND, JR., and WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Appellees.

Assignment of Errors.

And now on this 16th day of April, A. D. 1907, come the said appellees by John S. Dean, their solicitor, and say that the judgment and decree in said cause is erroneous and against the just rights of the appellees, for the following reasons:

1st. Because the evidence showed that there was no modification of the original written contracts between the Mount Carmel Coal Company, bankrupt, and The Atchison, Topeka & Santa Fe Railway Company and the Cherokee & Pittsburg Coal and Mining Company.

2nd. Because the evidence in the case showed that the money advanced by The Atchison, Topeka & Santa Fe Railway Company to the Mount Carmel Coal Company was a simple loan without security.

3rd. Because the evidence in the case showed that the claim of The Atchison, Topeka & Santa Fe Railway Company constituted nothing more than an ordinary unsecured claim against the bankrupt estate.

4th. Because the evidence showed that there was no pledge on the part of the bankrupt of any of its property, in existence, to secure The Atchison, Topeka & Santa Fe Railway Company for money advanced by it to the bankrupt.

5th. Because the evidence in the case showed that the money advanced by The Atchison, Topeka & Santa Fe Railway Company to the Bankrupt, was not advanced upon the strength of any security offered, or pledged, by the bankrupt.

6th. Because the evidence showed that the coal, upon which the said Atchison, Topeka & Santa Fe Railway Company claimed a lien, was not mined at the time the money was advanced by the said Railway Company to the bankrupt, but was still in the ground and a part of the real estate.

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7th. Because the evidence showed that there was no agreement, or understanding, between The Atchison, Topeka & Santa Fe Railway Company and the bankrupt, that a failure on the part of the bankrupt to repay advances made to it by the said Railway Company, should authorize the said Railway Company to avoid the provisions of the written contracts between the parties, and forfeit the rights of the bankrupt to the possession and enjoyment of the leased premises.

8th. Because the evidence showed that whatever agreement was made between The Atchison, Topeka & Santa Fe Railway Company and the bankrupt, at the time the money was advanced to the bankrupt by the said Railway Company, was a simple, oral contract between the parties for the repayment of said money, and had no dependence upon, and was in no way a modification of, or supplemental to, the written contracts between The Atchison, Topeka & Santa Fe Railway Company and Cherokee & Pittsburg Coal and Mining Company, and the bankrupt.

9th. Because the evidence showed that there was no agreement between The Atchison, Topeka & Santa Fe Railway Company and the bankrupt by which the said Railway Company agreed from time to time to advance money to the bankrupt for any purpose.

10th. Because the evidence failed to show that there was any coal mined and in the possession, or under the control, of the bankrupt at the time of the adjudication in bankruptcy to which any lien could be attached in favor of The Atchison, Topeka & Santa Fe Railway Company as security for money advanced by the said Railway Company to the bankrupt.

11th. The court erred in holding that The Atchison, Topeka & Santa Fe Railway Company was entitled to a preference for the amount of its claim out of all of the assets of the bankrupt's estate, and as against the general creditors of the estate.

12th. Because the court erred in holding that the claim of The Atchison, Topeka & Santa Fe Railway Company constituted an equitable lien upon coal mined by the Receivers and Trustees upon the leased premises at the expense of the bankrupt estate.

13th. Because the court erred in holding that the Receivers and Trustees in bankruptcy were legally bound upon the demand of The Atchison, Topeka & Santa Fe Railway Company and the Cherokee & Pittsburg Coal and Mining Company, to either deliver the possession of the leased premises to said Companies, or to produce and deliver to said Railway Company sufficient coal to repay to the Railway Company the amount of money loaned by it to the bankrupt, when the cost of producing such coal and delivering the same would have to be paid by the said Trustees and Receivers, out of the funds provided for the administration of the bankrupt estate.

14th. Because the court erred in holding that a lien could be created by an oral agreement between the bankrupt and The Atchison, Topeka & Santa Fe Railway Company, upon coal unmined and still a part of the real estate.

15th. Because the court erred in holding that the oral agreement

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creating a lien upon real estate was not void under the Statute of Frauds.

16th. The said court erred in reversing the judgment of the District Court of the United States for the District of Kansas, in favor of the appellees when it should have affirmed the judgment of said court according to the law of the land.

Wherefore the appellees pray that said judgment and decision of the Circuit Court of Appeals of the United States for the Eighth Circuit, be reversed, and that the said court may be directed to enter a decree affirming the judgment and decision of the United States District Court for the District of Kansas.

JOHN S. DEAN,
*Solicitor for Appellees.*

(Endorsed:) No. 2424. The Atchison, Topeka and Santa Fe Railway Co., *et al.*, Apellants, *vs.* J. E. Hurley, *et al.*, as Trustees, etc. Assignment of Errors. Filed Apr. 16, 1907. John D. Jordan, Clerk.

(*Supersedeas Bond.*)

And on the ninth day of May, A. D. 1907, a supersedeas bond was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 2424.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COMPANY, and THE CHEROKEE & PITTSBURG COAL AND MINING COMPANY, Appellants,

*vs.*

JAMES E. HURLEY, CYRUS LELAND, JR., and WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, a Bankrupt, Appellees.

Know all men by these presents, that we, James E. Hurley, Cyrus Leland, Jr., and Walter Reeves, as Trustees of the Estate of the Mount Carmel Coal Company, a bankrupt, principals, and B. P. Waggener as surety, are held and firmly bound unto the appellants, The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal and Mining Company, in the full and just sum of Two Thousand Dollars ($2,000), to be paid to the said The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and The Cherokee & Pittsburg Coal and Mining Company, their successors or assigns;

To which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 19 day of April, A. D. 1907.

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Whereas lately, to-wit, on the 20th day of March, 1907, at the United States Circuit Court of Appeals, for the Eighth Circuit, in a suit pending in the said court between The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and The Cherokee & Pittsburg Coal and Mining Company, appellants, and James E. Hurley, Cyrus Leland, Jr., and Walter Reeves, as Trustees of the Estate of the Mount Carmel Coal Company, a bankrupt, appellees, a judgment and decree was rendered against the said James E. Hurley, Cyrus Leland, Jr., and Walter Reeves, as Trustees of the estate of the Mount Carmel Coal Company, a bankrupt, reversing a judgment and decree of the United States District Court for the District of Kansas, theretofore rendered in said United States District Court for the District of Kansas, in favor of said Trustees and against the said The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal and Mining Company; and

Whereas the said Trustees having been granted an appeal from said judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit, in the aforesaid suit, to the United States Supreme Court; and having obtained a citation directed to the said The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal and Mining Company, citing and admonishing them to be, and appear, in the United States Supreme Court at the City of Washington, District of Columbia, within the time limited in said citation;

Now, the condition of the above obligation is such, that if the said Trustees shall prosecute said appeal to effect and answer all damages and costs if they fail to make said plea good, and to secure a reversal of the judgment and decree of the said United States Circuit Court of Appeals, in said case, then the above obligation to be void, else to remain in full force and virtue.

In witness whereof, the said obligators have hereunto set their hands.

J. E. HURLEY,
CYRUS LELAND, JR.,
WALTER REEVES,
*Trustees of The Estate of The Mt. Carmel Coal Company, Bankrupt.*
B. P. WAGGENER.

Approved:
ELMER B. ADAMS,
*Judge of the United States Circuit Court of Appeals, Eighth Circuit.*

(Endorsed:) No. 2424. The Atchison, Topeka and Santa Fe Railway Co., *et al.*, Appellants, *vs.* J. E. Hurley, *et al.*, Trustees, &c. Supersedeas Bond. Filed May 9, 1907, John D. Jordan, Clerk.

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(*Order Approving Bond on Appeal.*)

And on the ninth day of May, A. D. 1907, an order approving bond on appeal was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 2424. May Term, 1907.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
Appellants,
*vs.*
J. E. HURLEY ET AL., Trustees, &c.

Appeal from the District Court of the United States for the District of Kansas.

Now come the appellees herein and present a bond upon their appeal to the Supreme Court of the United States in the penal sum of $2,000.00.

Thereupon it is ordered that said bond be, and it is hereby, approved and by consent of the parties it is ordered that the same act as a supersedeas.

May 9, 1907.

ELMER B. ADAMS,
*U. S. Circuit Judge, Eighth Circuit.*

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2424. The Atchison, Topeka & Santa Fe Railway Company, *et al.*, Appellants, *vs.* J. E. Hurley, *et al.*, Trustees, &c. Order approving bond on appeal. Filed May 9, 1907, John D. Jordan, Clerk.

(*Citation on Appeal.*)

And on th[illegible]nth day of May, A. D. 1907, the citation on appeal was filed in t[illegible] Clerk's office of said Circuit Court of Appeals in said cause, the original of which with the acknowledgment of service attached thereto, is in the words and figures following, to-wit:

THE UNITED STATES OF AMERICA:

To The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, D. C., thirty days from and after the day this Citation bears date,



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pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit wherein J. E. Hurley, Cyrus Leland, Jr., and Walter Reeves, Trustees in Bankruptcy of the Estate of The Mount Carmel Coal Company, Bankrupt, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Elmer B. Adams, judge of the United States Circuit Court of Appeals for the Eighth Circuit, this sixteenth day of April, in the year of our Lord one thousand nine hundred and seven.

ELMER B. ADAMS,
*Judge of the United States Circuit Court of Appeals for the Eighth Circuit.*

I hereby acknowledge that the above citation on appeal was served upon me the 17th day of April, 1907.

ROBERT DUNLAP,
*Attorney for The A. T. & S. F. Rly. Co., The Osage Carbon Company, and the Cherokee & Pittsburg Coal and Mining Company.*

[Endorsed:] No. 2424. United States Circuit Court, of Appeals for the Eighth Circuit. J. E. Hurley *et al.*, Trustees, &c., Appellants, *vs.* The Atchison, Topeka and Santa Fe Railway Co. *et al.* Citation on Appeal. Filed May 9, 1907, John D. Jordan, Clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing one hundred forty-one pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said United States Circuit Court of Appeals, in a certain cause in said Court wherein The Atchison, Topeka & Santa Fe Railway Company *et al.*, were Appellants, and J. E. Hurley, Cyrus Leland, Jr., and Walter Reeves, Trustees in Bankruptcy of the Estate of The Mount Carmel Coal Company, Bankrupt, were Appellees, No. 2424, December Term, 1906, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation, with the acknowledgment of service attached thereto, is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

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Circuit, at office in the City of St. Louis, Missouri, this eleventh day of May, A. D. 1907.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.*

Endorsed on cover: File No. 20,728. U. S. circuit court of appeals, 8th circuit. Term No. 326. J. E. Hurley, Cyrus Leland, Jr., and Walter Reeves, trustees in bankruptcy of the estate of The Mount Carmel Coal Company, bankrupt, appellants, *vs.* The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal & Mining Company. Filed May 23d, 1907. File No. 20,728.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1908.

J. E. HURLEY, CYRUS LELAND, JR., AND WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Bankrupt,
*Appellants,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COMPANY AND CHEROKEE AND PITTSBURG COAL & MINING CO.,
*Appellees.*

No. 95.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## APPELLANTS' BRIEF.

JOHN S. DEAN,
FRANK HAGERMAN,
*Solicitors for Appellants.*

John G. Stewart, Printer, 723 Wall St., K. C., Mo.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1908.

J. E. HURLEY, CYRUS LELAND, JR., AND WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Bankrupt,
*Appellants,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COMPANY AND CHEROKEE AND PITTSBURG COAL & MINING CO.,
*Appellees.*

No. 95.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## APPELLANTS' BRIEF.

### STATEMENT.

1. THE APPEAL.

This appeal (Rec. 113) seeks to reverse a decree (Rec. 129-130) of the Circuit Court of Appeals for the Eighth Circuit, upon an opinion (Rec. 122-129, 153 Fed. Rep., 503; 82 C. C. A. 453) by a divided court, in favor of certain intervenors, directing the District Court for the District of Kansas (in lieu of compelling an

election by trustees in bankruptcy whether to assume the performance of an alleged oral modification of written contracts of the bankrupt to deliver to a railway company certain quantities of coal being mined by the trustees or reject the same), to pay to one of the intervenors below, an appellee here, from a bankrupt estate certain sums of money as preferential demands, in a cause where no such claim was made, either by pleadings or proof, and where at the trial the right to such a preference was "expressly and positively disclaimed."

2. GENERAL FACTS.

(*a*) *The Bankruptcy Proceedings.*

Proceedings in involuntary bankruptcy were on July 7, 1905, instituted in the District Court of Kansas (Rec. 35), against the Mount Carmel Coal Company, herein called the Mount Carmel Company, a coal mining company, resulting in an adjudication (Rec. 5-6) upon September 26, 1905 (Rec. 117). Pending the adjudication receivers were appointed (Rec. 7, 22, 35), the same persons, appellants here, being thereafter elected as trustees (Rec. 20, 22, 72, 92, 117) of the bankrupt. These receivers and trustees, at least up to June 1, 1906, operated the coal mines of the bankrupt, desired possession of which was the gravamen of the complaint of the prevailing intervention, unless the court would compel the trustees to assume the performance of an alleged oral modification of an existing written contract of the bankrupt, they, denying the existence thereof, never having elected so to do.

(*b*) *Written contracts of bankrupt existing at the time of bankruptcy.*

The Atchison, Topeka & Santa Fe Railway Company, herein called the Railway Company; Osage Carbon Company, herein called the Osage Company, and the Cherokee & Pittsburg Coal & Mining Company, herein called the Cherokee Company, upon October 1, 1896, executed a written lease and agreement (Exhibit A, Rec. 37-57) with Charles J. Devlin, by the terms of which there

was leased to Devlin for three years certain coal mining properties in Kansas, owned by the Osage and Cherokee Companies, from which Devlin was, during the lease, to mine coal and at agreed prices furnish the Railway Company certain quantities therefrom. This lease was, upon March 1, 1897, assigned (Exhibit B, Rec. 58) to the Mount Carmel Company. Upon June 1, 1898 (Exhibit C, Rec. 58-63), and August 30, 1900 (Exhibit D, Rec. 63-67), the assigned contract was modified in certain unimportant particulars and extended to June 1, 1906. By these contracts, the Osage and Cherokee Companies, for certain rentals and royalties, leased to Devlin and his assign, the Mount Carmel Company, certain coal mining properties, which the lessee agreed to operate and from which, at agreed prices, payable on or before the 15th of each month, to supply daily to the Railway Company, which was to take same, all the coal it required in the operation of certain of its lines; in the event of the termination of the contract the fixed improvements made by the lessee were to be paid for by the Osage and Cherokee Companies; the Railway, the Osage and Cherokee companies could terminate the contract for any failure on the part of the lessee, who could likewise terminate the same for any failure on the part of either of the other parties, but neither could terminate the same unless the other failed after 30 days' written notice to cure the failure of performance. The Mount Carmel Company gave a bond of $100,000 with sureties satisfactory to the other parties to secure its faithful performance of the contract.

(*c*) *Order of court in reference to the contracts.*

At the time (Rec. 35) of the institution of bankruptcy proceedings, and the appointment (Rec. 35) of receivers and upon July 7, 1905, the District Court entered (Rec. 92) an order, which among other things, provided:

" * * * if the receivers fail to operate the mines owned by the Cherokee & Pittsburg Coal & Mining Company, in accordance with the provisions of the contract between the said Chero-

kee & Pittsburg Coal & Mining Company and the Mount Carmel Coal Company, then said Cherokee & Pittsburg Coal & Mining Company may at once take possession of said mines and operate the same as fully as if said lease had never been made. * * * indebtedness existing for the pay of wages due to workmen, clerks and servants, which have been earned within three months before the commencement of this proceeding, not to exceed three hundred dollars to each claimant, shall be paid in full by the receivers."

This referred alone to the *written* contract and not to any oral modification thereof, for neither the Cherokee or Osage Company was a party thereto.

(*d*) *Action of receivers.*

Neither the receivers nor trustees (Ev. Leland, Rec. 89; Reeves, Rec. 90, 92) nor the court (Rec. 110) knew of any contract other than those in writing, the alleged oral modification, to quote the language (Rec. 110) of the judge administering the trust, being "unknown to the receivers and the court at the time of their appointment." When the receivers were appointed there was about $79,000, practically a month's wages, due miners, payment of most of which was provided for (Rec. 87, 88) by receivers' certificates.

(*e*) *Intervening petition and result thereon.*

On November 20, 1905, the Railway Company filed (Rec. 70) an intervening petition (Rec. 33-36) claiming that the written contracts aforesaid had been orally modified by an agreement between it and the Mount Carmel Company (the Osage and Cherokee Companies not being parties thereto) by which the former, *prior* to the bankruptcy proceedings, advanced to the latter for pay-roll purposes sums aggregating $57,304.16, which were to be repaid by the latter by the delivery, at the written contract prices, of coal which it should *thereafter* mine. The relief sought was to compel the trustees either to assume the alleged oral modification and deliver to the Railway Company coal mined by *them* in payment of such advances, or else to deliver possession of the mining property. Neither Mr. Devlin, the president of the Mount Carmel Company,

nor Mr. Wilder, treasurer of the Railway Company, who it is claimed made the alleged oral agreement, was alive at the time of the trial. It appears, however, that the advances were, prior to the bankruptcy proceedings, made by the Railway Company, and in accordance with a long established practice, not to pay the employes but to pay existing debts to banks, to induce them to furnish money for the pay-rolls, the Railway Company charging interest on the advances. After hearing the evidence the referee in bankruptcy found (Rec. 107, 108, 109) and the trial judge approved the finding (*id.*), that no oral modification of the contract was made or ever intended to be made.

The Circuit Court of Appeals in an opinion (Rec. 122-129) of Judge Adams (Judge Sanborn concurring and Judge Hook dissenting), held that because at the time the advances were made the Railway and Mount Carmel Companies understood and agreed that the bankrupt would repay the money with coal it should mine in the future; there was an equitable assignment of the coal to be thereafter mined, which the trustees accepted by using the property, and since at the time of that decision the leases had expired and the property surrendered, the Railway Company should have its claim paid as one preferential in its nature; this though the trial judge in his opinion (Rec. 107), without exception thereto, stated that intervenors "expressly and positively disclaimed" "any and all right * * * to preferential payment." From this action this appeal is prosecuted.

3. CASE IN DETAIL.

(*a*) *Intervening petition.*

The Railway, Osage and Cherokee Companies upon November 20, 1905, filed (Rec. 70) a joint intervening petition in which they alleged:

First—The execution by intervenors and the Mount Carmel Company of the written contracts aforesaid.

Second—Afterwards, the Mount Carmel Company represented

to the Railway Company it was impossible to pay off the miners, unless it would advance the money for the purpose, whereupon these *two companies only* orally agreed that the existing written contracts (Exhibits A, B, C and D) between the four companies should be modified to the extent that the Railway Company should advance the money for the pay-rolls, and the Mount Carmel Company should deliver to it in July and August, 1905, sufficient coal at the contract price to repay the advances. Upon account of the advances, after allowing credits there was due (Exhibit E, Rec. 68-70) upon September 27, 1905, $57,304.16.

Third—Upon July 7, 1905, receivers were appointed for the mining property in bankruptcy proceedings against the Mount Carmel Company upon account of which coal was not delivered in payment of the advances, by reason of which the Railway, Osage and Cherokee Companies were entitled to declare the leases forfeited, and are entitled to the property, unless the receivers be directed to assume and perform the contract as orally modified by delivery to the Railway Company coal in a sufficient amount to collect the indebtedness, wherefore, intervenors prayed that the receivers either deliver to the Railway Company coal in sufficient quantity to pay the debt, or else make to the lessors redelivery of the mining property under the terms of the lease.

(*b*) *Answer to intervening petition.*

The amended answer (Rec. 72) of the trustees in bankruptcy denied each allegation of the petition, and that the alleged verbal contract, even if made, was any modification of the written, contract and also averred that if made, it was violative of the Kansas Statute of Frauds providing that all contracts for interests in land to be valid must be in writing.

(*c*) *Evidence before referee.*

The matter was heard before Hon. N. H. Loomis, then referee in bankruptcy, the following evidence being offered:

It was (Rec. 72) admitted that the intervening petition might be amended by naming the trustees in bankruptcy as the successor

to the receivers who were in possession when the petition was filed, and that Exhibits A to F attached to the petition were correct copies of the original written contracts.

A. O. Wellman (Abs. 72-86) testified: The items of the account (Exhibit E) were correct; C. J. Devlin, president of the Mount Carmel Company, for a long period of time, had been in the habit of obtaining advances from the Railway Company which he said were for pay-roll purposes to be paid for out of coal furnished by it in the future under the contract; upon these advances interest was charged; Devlin would state that he had borrowed from banks to meet his pay-roll, and when the note became due he would represent he could not raise the money for the pay-roll, unless he could pay these notes off, and the Railway Company accordingly made the advances, Devlin stating that payment would be made in coal mined in the future under and at the prices fixed in the contracts. Both Devlin and Mr. Wilder, treasurer of the Railway Company, between whom the alleged arrangement was made, were dead; no certain fixed or definite arrangement as alleged was testified to.

Cyrus Leland, Jr., (Rec. 86-89) one of the receivers and trustees, testified: While he had never read the *written* contracts, he knew of their existence; the pay-rolls of the mines were about $80,000 per month; upon taking charge the receivers had to borrow $50,000 to meet the pay-roll for the last half of June, 1905; since then the Railway Company advanced money for every pay day, but were furnished coal in amounts in excess thereof; the receivers and trustees never knew that there had been any *verbal* modification of the written contracts and never undertook or intended to carry out same.

Walter Reeves, (Rec. 89-92) another of the receivers and trutsees, testified that he never before the trial heard of the alleged verbal contract.

An order (Rec. 92) in the bankruptcy proceedings, July 7,

1905, was offered, it providing as already stated (*Infra* Div. 2, c), for the operation of the mines by the trustees.

W. H. Rossington (Rec. 93-95) by affidavit, admitted as a deposition, testified: In June, 1905, C. J. Devlin was stricken with illness and incapacitated from transacting business; about June 20, 1905, he and Geo. R. Peck conferred with Mr. Norton, the manager of the Mount Carmel Company, about the necessity and means of raising money to meet pay-rolls; Peck suggested that the Railway Company advance the money; Norton said that the last two months' accounts had been hypothecated for the purpose, and coal that was to be furnished was still in arrears; Norton afterwards said that the Railway Company had subsequently agreed to advance this money and did so to the amount of $41,000 or $43,000. Written objections (Rec. 96-98) to most of this testimony as hearsay were, by the trustees, made, and by the referee overruled (Rec. 109).

(*d*) *Referee's report and order.*

The referee upon January 27, 1906, (Rec. 100-107) reported that the agreement under which the advances were made was a separate undertaking (to which the Osage and Cherokee Companies were not parties) not entering into or forming a part of or any modification of the written contracts, nor so intended by either party; the advances were consistent with the written contracts and were made in accordance with a practice which had been, for a considerable time, followed.

Upon this report (Rep. 100-108) there was by the referee entered an order (Rec. 98) denying the petition of intervention.

(*e*) *Petition for review.*

Petitioner filed a petition for review (Rec. 221-24), but never even claimed or asserted therein any claim for a preference.

(*f*) *Opinion and order of District Court.*

The District Court, on March 5, 1906, upon an opinion (Rec. 100-112) of Judge Pollock, who was administering the property,

entered an order (Rec. 99) confirming and approving the findings and report of the referee.

This opinion held:

(1) Intervenor in oral and written arguments expressly disclaimed any claim of subrogation to the rights of the miners, whose claims were paid and *any preference over the other creditors,* the report (Rec. 107) in this respect reciting:

"At the oral argument and in the written briefs filed on behalf of the petitioners any and all claims of subrogation to the rights of the miners whose demands were paid off and discharged out of the money advanced by the Railroad Company is disclaimed by the petitioners. Also, any and all right of petitioners to preferential payment of the money so advanced out of the bankrupt estate is as expressly and positively disclaimed."

(2) The referee was right in holding that the evidence showed that there was never any modification of, nor intention to modify the written contracts; nothing more could be claimed than that the debtor promised to pay a general creditor out of specific funds which might be created and be in its *own* hands in the future; neither the court nor the receivers ever knew of any verbal modification of the written contracts and neither ever intended to adopt any such modified contract; had the written lease made provision for the payment to the Railway Company out of coal to be mined in the future, a violation of the covenant would have given no right to the lessors to forfeit the lease or retake the property, nor the Railway Company any right to any preference.

(g) *Appeal and result thereof.*

An appeal (Rec. 112, 113) was upon March 12, 1906, prayed for and allowed to the Circuit Court of Appeals, not one of the ten assigned errors (Rec. 114, 115) claiming a preference, the nearest thereto being that the receivers should be required to deliver to it coal to the amount of its advances.

Although the Circuit Court of Appeals held its regular May and September, 1906, terms, no attempt was made to advance

the cause, and it was not until December 10, 1906, (Rec. 121-129) that the cause was argued. An opinion was handed down (Rec. 121-129) March 20, 1907, by Judge Adams (Judge Sanborn concurring and Judge Hook dissenting) to the effect:

First—As the Railway Company made the advances upon the promises of the Coal Company to repay same out of coal from mines in its possession to be mined by it in the future, this was an equitable assignment of the coal when it came into existence.

Second—The written contracts were modified by a parol contract to pay for advances with coal subsequently mined, and hence when the trustees continued in possession, they, as a matter of law, adopted the contract *as thus modified*, so that the equitable assignment became binding upon the trustees, and they thereby became obligated to pay the debt of the bankrupt in coal mined by them.

Third—Since at the time of the decision the lease had expired so that the debt could not be then paid in coal the cause was reversed and the court below directed to establish the demand as one preferential in its nature, though at the trial below a right to a preference was (Rec. 107) positively disclaimed, and no such right was ever claimed.

(*h*) *Appeal here.*

The decision of the Circuit Court of Appeals not being regarded as final, an appeal was (Rec. 130) allowed to this court, where a motion has been filed to dismiss because a finding of fact was not made under clause 3 of General Order XXXVI, adopted by virtue of Section 25*b* of the Bankruptcy Act, and because the case was not appealable under Section 25*a*, subdivisions 1 and 2, for that the question involved is not one which might have been taken on appeal from the highest court of a state, and no certificate was given by a justice of this court. This motion is to be presented with the merits of the case.

## APPELLANT'S ARGUMENT.

### I.

### Motion to Dismiss.

(1) The Motion.

Appellees have filed a motion to dismiss based upon the grounds: (a) No finding of fact was made by the Circuit Court of Appeals. (b) The case was not appealable under Section 25*a*.

(2) The Case.

To properly appreciate the record it is necessary to keep in mind several features of the case.

(a) Certain coal mines were in the custody of and being operated by receivers and trustees in bankruptcy as lessees so that possession thereof could only be obtained by intervention in the bankruptcy proceeding, or by independent suit by leave of that court (*Barton* v. *Barbour*, 104 U. S. 126, 36 L. Ed. 672; *In re Tyler*, 149 U. S. 164, 37 L. Ed. 689). Such an intervention or suit would be based upon the fact that the property was in the custody of the bankrupt court, so that it could be maintained independently of diverse citizenship.

(b) No claim for a debt was presented for allowance. The facts alleged were that the Railway and Mount Carmel Companies alone orally agreed to modify that portion of the written contracts to which they with the Osage and Cherokee Companies were parties, by a proviso that the Railway Company would make certain advances to the Mount Carmel Company which would by the latter be paid for in coal to be by the latter mined in the future from mines in its own possession. Although neither lessor

had any interest in this question, and neither was a party to the alleged modification, both joined with the Railway Company in the intervention, and the prayer (Rec. 35) was:

"That J. E. Hurley, Cyrus Leland and Walter Reeves, receivers appointed in the above entitled proceedings in bankruptcy, be directed either to deliver to said Atchison, Topeka & Santa Fe Railway Company an amount of coal sufficient to carry out the provisions of the contract hereinbefore set forth, as modified by the verbal contract between the said Mount Carmel Coal Company and the Atchison, Topeka & Santa Fe Railway Company, as hereinbefore set forth; or that said receivers be ordered and directed to deliver over the possession of all the lands and properties described in said written contracts hereinbefore set forth, upon the payment to said receivers of the amount provided to be paid to said Mount Carmel Coal Company under the terms of said leases, and that the property of said Mount Carmel Coal Company, for which said payment is made, be at the same time turned over to said Cherokee & Pittsburg Coal & Mining Company, the Osage Carbon Company and the Atchison, Topeka & Santa Fe Railway Company, in full compliance with the terms and provisions of said contract."

It is therefore plain the only thing *sought* was to compel the trustees to elect to assume the alleged *oral* modification and deliver to the Railway Company certain quantities of coal, or else to deliver to the lessors the coal mines being operated by the receivers and trustees. In either alternative the action was in substance one to recover property (either coal or the mines) in the custody of the District Court, there being no attempt to establish any debt, nor to assert any right given under the Bankrupt Act.

(c) Not only was there no effort to prove a debt, but the right to any preference or lien was expressly disclaimed. The trial judge expressly (Rec. 107) said:

"At the oral argument and in the written briefs filed on behalf of petitioners any and all claim of subrogation to the rights of the miners whose demands were paid off and discharged out of the money advanced by the Railway Company is disclaimed by petitioners. Also, any and all right of petitioners to preferential payment of the money so advanced out of the bankrupt estate is as expressly and positively disclaimed."

This statement was in no wise challenged, and neither by exceptions or assignments of error (Rec. 114-116) upon appeal was any claim of a preference or the right to the allowance of a debt presented, so that it was not to be expected that any party would prepare or request findings of fact or conclusions of law. When the Circuit Court of Appeals, contrary to the claims of the parties, regardless of the pleadings, and in the face of a disclaimer of a preference, decided that since the term of the lease had expired, a preferential claim would be established, it was too late to obtain a findings of fact or conclusions of law. This because paragraph 3 of the General Order XXXVI in Bankruptcy limited the making of same by the court to "at or before the time of entering its judgment or decree." So when the Circuit Court of Appeals *first* discovered the right to a preference it was too late to obtain findings of fact, a very good reason for not now dismissing the appeal because of a want thereof.

With these considerations in mind we now deal with the question of the right of appeal, first considering whether there was the right of appeal to this court irrespective of the Bankrupt Act.

(3) RIGHT OF APPEAL IRRESPECTIVE OF THE BANKRUPT ACT.

(a) Section 6 of the Act of March 3, 1891, (26 Stat. L. 828; 4 Fed. Sts. Ann. 409) creating the Circuit Court of Appeals, provides:

" * * * the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and admiralty cases. * * * In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of

error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed."

The jurisdiction in this case, which sought to recover property in the custody of the United States, was not dependent upon the citizenship or alienage of the parties either to the intervention or to the original cause, it did not arise under any patent, revenue or criminal law, nor was it an admiralty case. It was therefore a case "not hereinbefore in this section made final" and hence clearly appealable to this court.

So this court has repeatedly applied the principle holding that the decision of the United States Circuit Court of Appeals was not final in suits upon a bond of the Circuit Clerk (*Howard* v. *U. S.*, 184 U. S. 676, 46 L. Ed. 754) or United States Marshal (*Sonnetheil* v. *Brewing Co.*, 172 U. S. 401, 43 L. Ed. 492), against railroad corporations organized under an Act of Congress (*Northern Pacific Ry. Co.* v. *Soderberg*, 188 U. S. 526, 47 L. Ed. 575; *U. P. R. Co.* v. *Harris*, 158 U. S. 326, 39 L. Ed. 1003), between a foreign state and a citizen of this country (*Republic of Columbia* v. *Cauca Co.*, 190 U. S. 524, 47 L. Ed. 1159), infringement of trade marks (*Werner* v. *Searle*, 191 U. S. 195), recovery of revenue taxes paid under protest (*Spreckles Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 48 L. D. 496), invoking jurisdiction both because of diverse citizenship and of a federal question (*Mississippi River Commission* v. *Ill. Cent. R. Co.*, 203 U. S. 335, 51 L. Ed. 209), against receiver of a National Bank (*Auten* v. *U. S.*, 174 U. S. 125, 43 L. Ed. 920), by the government to cancel patent (*U. S.* v. *Amer. Bell Telephone Co.*, 159 U. S. 548, 40 L. Ed. 255).

Whenever a question has been in an intervention in a receivership case, the test as to whether the decision of the Circuit Court of Appeals is final, is the ground of jurisdiction of the original cause in which the receiver is appointed (*Pope* v. *L. & N. R. Co.*, 173 U. S. 573, 43 L. Ed. 814; *Rouse* v. *Hornsby*, 161 U. S. 588, 40 L. Ed. 817; *Carey* v. *Houston & T. C. R. Co.*, 161 U. S.

115, 40 L. Ed., 638). Tested by this rule the original jurisdiction in the bankruptcy case arose under the bankruptcy law and not by virtue of any exceptions named in the act of 1891. The intervention was because the property sought to be recovered was actually in the custody of the District Court.

(b) All cases wherein the decision of the Circuit Court of Appeals is not made final by the Act of March 3, 1891, are by virtue thereof still appealable though they arose in bankruptcy proceedings.

*Hewit* v. *Berlin Machine Works*, 194 U. S. 296, 300, 48 L. Ed. 986, 987, 988, was a successful intervention in a bankruptcy proceeding asserting title to property in the hands of the trustee in which the trustee, just as intervenors did here (Rec. 112, 113), took to the Circuit Court of Appeals by *general* appeal instead upon petition for supervision and revision under Section 24*b* of the Bankrupt Act. In sustaining an appeal from the Circuit Court of Appeals, Mr. Chief Justice Fuller said:

"If the trustee had carried the case to the Circuit Court of Appeals on petition for supervision and revision under Sec. 24*b* of the Bankruptcy Law (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), the case would have fallen within *Holden* v. *Stratton*, 191 U. S. 115, *ante*, 116, 24 Sup. Ct. Rep. 45, and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals could, under Sec. 24*a*, exercise appellate jurisdiction as in other cases. Section 25*a* relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required. (*Holden* v. *Stratton*, 191 U. S. 115, *ante*, 116, 24 Sup. Ct. Rep. 45), while Sec. 24*a* relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by Sec. 2, to settle the estates of bankrupts, and to determine controversies in relation thereto. *Hutchinson* v. *Otis*, 190 U. S. 552, 47 L. Ed. 1179, 23 Sup. Ct. Rep. 778; *Burleigh* v. *Foreman*, 125 Fed. 217.

The appeal to this court then followed, under Sec. 6 of the Act of March 3, 1891, (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550)."

In *First National Bank* v. *Klug*, 186 U. S. 203, 205, 46 L. Ed. 1127, 1128, Mr. Chief Justice Fuller said:

"Apart from Sec. 25, the Circuit Courts of Appeals have jurisdiction on petition to superintend and revise any matter of law in bankruptcy proceedings, and also jurisdiction of controversies over which they would have appellate jurisdiction in other cases. The decisions of those courts might be reviewed here on *certiorari*, or in certain cases by appeal, under Sec. 6 of the Act of 1891."

*Huntington* v. *Saunders*, 163 U. S., 319, 320, 41 L. Ed., 174, 175, was an appeal from the Circuit Court of Appeals in denying a creditor's objection to the discharge of a bankrupt. Mr. Chief Justice Fuller said:

"From the final decree of the Circuit Court of Appeals Huntington prayed an appeal to this court, which was allowed, and having been docketed here, a motion to dismiss was made.

This appeal is prosecuted under the last clause of Sec. 6 of the judiciary act of March 3, 1891, providing: 'In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1,000 besides costs.' This is not one of the cases in which the decrees or judgments of the Circuit Courts of Appeals are made final by that section, but in our opinion the matter in controversy does not exceed $1,000 besides costs."

In *Elliott* v. *Toeppner*, 187 U. S., 327, 334, 47 L. Ed., 200, 203, Mr. Chief Justice Fuller said:

"In *Bardes* v. *First National Bank*, 175 U. S., 526, 44 L. Ed., 261, 20 Sup. Ct. Rep., 196, we held that the 5th and 6th sections of the judiciary act of March 3, 1891 (26 Stat. at L. 827, 828, Chap. 517, U. S. Comp. Stat., 1901, p. 549, 550), were not changed by the bankruptcy act. The 6th section gives the courts of appeals jurisdiction to review by appeal or writ of error final decisions in the District and Circuit Courts in cases other than those provided for in the 5th section."

It is therefore plain that the judgment of the Circuit Court of Appeals was not final and this cause was appealable to this

court regardless of any of the provisions of the bankrupt law.

(4) THE APPEAL NOT BEING UNDER SECTION 25*b*, THE LIMITATIONS OF PARAGRAPHS 1 AND 2 OF SUBDIVISION b, ARE NOT APPLICABLE.

(a) Section 25 of the Bankrupt Act provides:

"Sec. 25. *Appeals and Writs of Error.*—(a) That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Courts of Appeals of the United States, and to the Supreme Court of the Territory, in the following cases, to-wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) *from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.* Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

(b) From any final decision of a court of appeals, *allowing or rejecting a claim under this act*, an appeal may be had under such rule and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of the state to the Supreme Court of the United States; or

2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States. * * *"

The points are now made that the case is not one where the case might have been taken from the highest court of the state, and there was no certificate made by a justice of this court.

(b) The appeals provided for by this section only relate to the particular steps therein specifically enumerated. Thus, in *Hewit v. Berlin Machine Works*, 194 U. S., 296, 300, 48 L. Ed., 986, 987, Mr. Chief Justice Fuller observed:

"Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required * * *"

Therefore, since this appeal is not as to anything in section 25 enumerated, there is nothing in the motion to dismiss so far as it is based upon a noncompliance with that section. All the questions presented could be safely left here. There are, however, other suggestions equally fatal.

(5) General Order XXXVI has no Application to an Appeal Under the Act of 1891.

(a) General Order XXXVI reads:

"1. Appeals from a court of bankruptcy to a Circuit Court of Appeals, or to the Supreme Court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided for in this act, by the rules governing appeals in equity in the courts of the United States.

2. *Appeals under the act* to the Supreme Court of the United States from a Circuit Court of Appeals, or from the Supreme Court of a Territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party *is entitled by the act* to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

(b) The power to adopt the order was derived from subdivision b of section 25 of the Bankrupt Act which provides that "and may be had under such rule * * * as may be prescribed by the Supreme Court. * * *"

From this it is to be observed that the "rules" to be made, so far as concerns this case, relate only to appeals from a "final decision *allowing or rejecting a claim under this act*" so that Gen-

eral Order XXXVI is likewise so limited. Hence, if the decree below was not *"one allowing or rejecting a claim under the act,"* then such general order has no application to this case. These words have reference to those previously used in subdivision 2, section 2, giving jurisdiction to "allow or disallow" claims and in subdivision 3 of section 25 allowing an appeal "from a judgment allowing or rejecting a debt or claim of five hundred dollars." Unless the demand presented came within this definition then General Order XXXVI has no application. That it does not is plain. The claim *presented* was for property. No effort was made to establish a debt and incidentally thereto a preference, for all claim of preference was (Rec., 107) expressly disclaimed. The whole theory of the intervention was to compel the trustees to assume or reject the alleged oral modification of the written contract.

*In Re Whitener*, 44 C. C. A., 434, 105 Fed. Rep., 180, 186, 187, is much in point. It was there decided that a decree awarding to an intervenor property in the hands of a trustee, was not "a judgment allowing or rejecting a debt or claim of five hundred dollars or over." Judge Pardee said:

"The question presented on the motion to dismiss is whether this judgment of restitution is a judgment allowing or rejecting a debt or claim of $500 or over. It is not contended that it is a debt, but it is contended that it is a claim, within the meaning of the statute. The word "claim," as used in the above connection—"debt or claim of $500 or over" —seems to mean a moneyed demand, the same as "debt," and was used not to enlarge, but to render certain. The word "debt," as defined in the first section of the statute, includes any debt, demand, or claim provable in bankruptcy. The word "claim," although frequently used in the bankruptcy act, is not specifically defined; but section 57 of the act is entitled, "The Proof and Allowance of Claims," and the word as therein used in every instance refers to, and means only, a moneyed demand. Paragraph "k" of the section is to the effect that claims which have been allowed may be reconsidered for cause, and reallowed or rejected, in whole or in part, according to the equities of the case, before, but not after, the estate has been closed. To give the word "claim" the broad meaning contended for would be to prac-

tically enlarge the statute so as to give the right of appeal in every disputed claim involving $500 or over occurring in the administration of the bankrupt's estate; for all contests therein, including questions of discharge of the bankrupt and selling property, can easily be shown to be claims within the broad meaning of the word "claim,"—a demand or supposed right. The proceeding in the court below was a proceeding in the administration of the bankrupt's estate, and was in no proper sense a proceeding to allow or reject a debt or claim against the bankrupt's estate. * * *"

*Chapman* v. *Bowen*, 207 U. S., 89, relied upon by appellees, lends no aid to this question because that was a case where a debt was presented for allowance and duly allowed, and the appeal was only by virtue of section 25 and not under the act of 1891.

(b) But if there was an *allowance* of a claim under sections 2 and 25, there was as already seen no appeal under section 25 The appeal was under the Act of 1891. Now General Order XXXVI, made under and by virtue of section 25, only applies to a "case in which either party is entitled *by the act* to take an appeal to the Supreme Court." So all the limitations of subdivision b of section 25 are restrictions upon the right of appeal given by the section. An appeal under the Act of 1891 is free therefrom. It has already been shown that an appeal lies under that act, wholly irrespective of the Bankrupt Act. Hence General Order XXXVI has no application. *Hewit* v. *Berlin Machine Works*, 194 U. S., 296, 300, 48 L. Ed., 986, 987, is conclusive upon this subject.

We proceed then to consider the merits of the case.

## II.

**Inasmuch as the fund out of which the advances were to be repaid remained in the bankrupt's custody, no equitable assignment was made, or equitable charge created, hence upon no theory could the intervenors prevail.**

(1) VIEW OF THE CIRCUIT COURT OF APPEALS.

The majority opinion (Rec., 125) of the Circuit Court of Appeals is bottomed upon the proposition that the alleged verbal modification operated as an equitable charge upon the coal when subsequently mined, for Judge Adams said:

"We would think the inevitable meaning of the new arrangement interpreted in the light of the conditions surrounding the parties and as necessarily intended by them was to pledge a sufficient amount of coal after it should be mined as security for the payment of advances made. This result is not expressed in the conventional form of a mortgage or pledge but the method of producing it was devised for the purpose of acquiring the needed money by the coal company and of furnishing security for its repayment. If the parties intended the arrangement to be one for borrowing and securing the repayment of money, we ought, as between them, to so regard it and to treat it is creating an equitable charge or lien, however inartificially it may have been expressed."

(2) THE PLEADINGS, EVIDENCE, REFEREE'S REPORT, FINDING OF THE TRIAL JUDGE AND OPINION OF THE CIRCUIT COURT OF APPEALS ALL SHOW THAT THE ALLEGED PAYMENT WAS EXPECTED TO BE MADE FROM A FUND IN THE CUSTODY OF THE DEBTOR.

The intervening petition (Rec., 34) concedes that the custody of the property was to be at all times in the Mount Carmel Company, by reciting:

"That afterwards said Mount Carmel Coal Company, by its president, Charles J. Devlin, duly authorized, represented to the Atchison, Topeka & Santa Fe Railway Company that it was impossible for said Mount Carmel Coal Mining Company to pay off the laborers engaged in mining coal by said Mount Carmel Coal Company upon the lands described in the leases and contracts hereinbefore referred to, unless the Atchison, Topeka & Santa Fe Railway Company would advance to said Mount Carmel Coal Company enough moneys to enable the said Mount Carmel Coal Company to pay the laborers engaged in operating said mines. And it was thereupon agreed between the said Mount Carmel Coal Company and the said The Atchison, Topeka & Santa Fe Railway Company that the contracts and extensions thereof, hereinbefore

referred to, should be modified to the extent that the said railway company should advance the necessary moneys to pay off the laborers and keep said mines in operation and for the moneys so advanced the said Mount Carmel Coal Company should deliver to the said The Atchison, Topeka & Santa Fe Railway Company, during the months of July, 1905, and August, 1905, a sufficient amount of coal at the prices provided for in the contracts hereinbefore referred to to fully cancel and liquidate the indebtedness thereby created."

Indeed, the whole basis of the claim is that the debtor was to mine the coal from mines in its possession, and deliver the same in payment of the advances.

As already seen, the position taken (Rec., 107) by intervenors in the District Court and adopted (Rec., 124, 125) by the Circuit Court of Appeals, was that the bankrupt "agreed to mine and deliver to the railway company" coal from the mines in its possession.

(3) THERE WAS NO ASSIGNMENT IF THE PAYMENT WAS TO BE FROM FUND IN HANDS OF THE DEBTOR.

To support this conclusion Judge Adams relied upon *Fourth Street Bank* v. *Yardley*, 165 U. S., 634, 41, L. Ed., 855 (some cases of a like character being cited), where it was held that an equitable assignment could be adjudged when advances were made upon a clearly expressed agreement to pay same out of a specific fund in the hands of a third party.

The whole foundation for the opinion disappears when the fact is remembered that here the repayment was to be by the debtor out of property in his own hands. The cases make this plain. Thus, in *Christmas* v. *Russell*, 14 Wal., 69, 84, 20 L. Ed., 762, 764, the debtor absolutely and unconditionally agreed to pay a creditor with or out of the proceeds of a note in his own possession. Mr. Justice Swayne said:

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect, the phraseology employed is not material provided the intent to transfer is mani-

fested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. * * *"

In *Dillon* v. *Barnard,* 21 Wal., 430, 440, 22 L. Ed., 673, 677, it appeared that a railroad company agreed to pay its construction contractor out of the proceeds realized by it from a sale of its bonds. In denying an equitable lien Mr. Justice Field said:

"The present case, notwithstanding the largeness of the plaintiff's demand, is not different in its essential features from those cases of daily occurrence, where the expectation of a contractor, that funds of his employer derived from specific sources will be devoted to the payment of his services or materials, is disappointed. Such expectation, however reasonable, founded even upon the express promise of the employer that the funds shall be thus devoted, of itself avails nothing in favor of the contractor. Before there can arise any lien on the funds of the employer, there must be, in addition to such express promise, upon which the contractor relies, some act of appropriation on the part of the employer depriving himself of the control of the funds, and conferring upon the contractor the right to have them applied to his payment when the services are rendered or the materials furnished. There must be a relinquishment, by the employer, of the right of dominion over the funds, so that without his aid or consent the contractor can enforce their application to the payment when his contract is completed. *Rogers* v. *Hosack,* 18 Wend., 319; *Dickenson* v. *Phillips,* 1 Barb., 454; *Hoyt* v. *Story,* 3 Barb., 262; *Hall* v. *Johnson,* 20 Pick., 197; *Christmas* v. *Griswold,* 8 Ohio St., 558; *Christmas* v. *Russell,* 14 Wall., 70 (81 U. S., XX, 762); *Malcolm* v. *Scott,* 3 Hare, 46. * * *"

In *Meyer* v. *Delaware Railroad Construction Company,* 100 U. S., 457, 477, 25 L. Ed., 593, 600, 601, a railroad company agreed to pay its construction contractor out of funds collected by it from municipal aid, voted in aid of construction. In denying an equitable charge Mr. Chief Justice Waite said:

"It is contended that the words, 'All the money for the work hereinbefore specified to be paid by the citizens of Delaware county,' which appear above the signature of the president of the railroad company to the contract, give the construction company collateral security, and thus vitiate the lien. We cannot so interpret the contract. In the body of the instrument the obligation of the railroad company, to pay, is absolute and unconditional. The

additional clause does not purport to transfer to the construction company the moneys that are due or that may become due from the citizens of Delaware county. No control is given the construction company over these moneys. The most that can be said of the clause is that it contains an implied obligation on the part of the railroad company to use the money which came into its hands from the citizens of Delaware county to discharge its obligations under the contract, and a corresponding obligation on the part of the construction company to wait a reasonable time for the collection of these moneys before putting the railroad company in default for non-payment. In *Christmas* v. *Russell*, 14 Wall., 69 (81 U. S., XX, 762), we said: 'An agreement to pay out of a particular fund, however clear its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. * * * The assignor must not retain any control over the fund, any power to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee.' It seems to us that this is conclusive of the present case. The railroad company has nowhere by its agreement given the construction company any power to collect. * * *"

In *Ex Parte Tremont Nail Co.*, 24 Fed. Cas., 183, 184, No. 14168, it was, just as here, sought in bankruptcy to establish an equitable lien in favor of a creditor because the debt was created by the promise to pay same out of the first money received from a customer for whom a large order was being filled. This case is so precisely in point that we quote extensively what Judge Lowell said:

"The parties have acted throughout in the utmost good faith, and there is a strong moral equity, so to call it, for the petitioners; but the question is whether they had what, in equity as admitted in the courts, amounts to an assignment of part of the debt due from Dunn. A learned judge has said that the law of equitable assignments is brought to such an exquisite degree of refinement that it is by no means easy to understand it. *Field* v. *Megaw*, L. R., 4 C. P., 660, per Brett, J. And another judge, in a case which, in one aspect, resembles the one at bar, said that the lien might depend on whether the word used was 'will' or 'shall,' in an oral agreement collateral to a negotiable instrument. *Thomson* v. *Simpson*, 5 Ch. App., 659. In the case first above cited, the decision was that a promise to pay when a certain debt is received is not an equitable assignment of the debt. Two of the judges in that case intimate that a promise to pay out of a particular debt, or fund, would work a transfer. A like dictum was made by

Lord Truro, in *Rodick* v. *Gandell*, 1 De Gex, M. & G., 763, and this was followed by a decision of a learned vice-chancellor, afterwards lord chancellor, founding himself solely on this dictum (*Kiccard* v. *Prichard*, 1 Kay & J., 277); but he overruled the decision of a very eminent chancellor to the contrary (Bradley's Case, Ridg., t. Hard., 194). The refinement appears in this: that while an agreement to pay out of a fund is one the border line, it is held both in England and in the United States, that any order or assignment, oral or written, to pay out of a particular fund, made upon the debtor or holder of the fund, or an agreement to give such an order, or a mere oral direction to go and receive the money and pay such and such debts with it, does operate as an equitable assignment. See *Diplock* v. *Hammond*, 2 Smale & G., 141, affirmed 5 De Gex, M. & G., 320; *Gurnell* v. *Gardner*, 4 Giff., 626; *Hunt* v. *Mortimer*, 10 Barn. & C., 44; *ex parte Carlon*, 4 Deac. & C., 120; *Bank of U. S.* v. *Huth*, 4 B. Mon., 423; *Newby* v. *Hill*, 2 Metc., (Ky.) 530; *Richardson* v. *Rust*, 9 Paige, 243. In the United States, it was held many years ago that a mere promise to pay out of a particular fund, when received, the promisor retaining control over the fund, and no notice being given to the person who is to pay it, would not work an equitable assignment. *Rogers* v. *Hosack*, 18 Wend., 319. This case was remarked upon by the chancellor in *Richardson* v. *Rust*, 9 Paige, 243; but it has been followed in all the cases which I have seen, and appears to be the settled law of this country. See *Hoyt* v. *Story*, 3 Barb., 262; *Christmas* v. *Russell*, 14 Wall. (81 U. S.), 69; *Tris'* v. *Child*, 21 Wall. (88 U. S.), 441, per Swayne, J.; *Christmas* v. *Griscold*, 8 Ohio St., 558; *Connely* v. *Harrison*, 16 La. Ann., 41; *Eib* v. *Martin*, 5 Leigh, 132; *Ford* v. *Garner*, 15 Ind., 298; *Pearce* v. *Roberts*, 27 Mo., 179.

With these cases before me, I cannot hold that the agreement between these parties gave any lien or charge on Dunn's debt in favor of these petitioners, and their petition to stand as privileged creditors is denied. * * *"

The doctrine now contended for has been repeatedly reaffirmed in the federal courts. (*Putnam Savings Bank* v. *Beal*, 54 Fed. Rep., 579; *Badgerow* v. *Manhattan Co.*, 74 Fed. Rep., 926; *Commercial Bank* v. *Rufe*, 92 Fed. Rep., 795.)

In *Hale* v. *Dressen*, 76 Minn., 183; 78 N. W., 1045, 1046, an investment company agreed to pay a debt out of rents which it would in the future collect from its own property. Chief Justice Start said:

"Its promise to pay interest from the rents was only its personal executory agreement to pay a part of what it was legally bound to pay; for the promise of a debtor to pay his creditor, out of a designated fund, of which he retains control, when the same is received by him, is a personal agreement only, and cannot be construed either as an equitable assignment or a lien on the fund. *Cordage Co.* v. *Seymour*, 67 Minn., 315, 69 N. W., 1079; *Rogers* v. *Hosack's Ex'rs.*, 18 Wend., 319; *Christmas* v. *Russell*, 14 Wall., 69. * * *"

*Fairbanks* v. *Welshans*, 55 Neb., 385, 75 N. W., 865, 873, was a somewhat similar case, Ragan, C., saying:

"In the case at bar Morse & Company do not claim that they have any legal lien upon the assets of this co-partnership of Welshans & Company, but they do claim that they have an equitable lien upon these assets because of the provisions of the contract under which they sold the boilers. They base this claim of an equitable lien upon these assets upon the provisions of the contract in and by which Welshans & Company agreed that Morse & Company should be paid for the boilers as soon as they were set in place and accepted by the United States, and paid for out of the moneys coming to Welshans & Company from the United States on the contract for the improvement in which said boilers were used. The petition does not allege that the agreement between Morse & Company and Welshans & Company not only provided that Morse & Company should be paid for their boilers out of the money coming on the contract with the United States, but that they should have a lien upon the proceeds of that contract. But it is obvious that this is the pleader's legal conclusion of the effect of and not the actual contract between the parties. But an agreement of the debtor to pay his creditor's claim out of the moneys received from a particular fund, but which gives the creditor no present right in or control over the fund, save through the debtor, and looks to the future acts of the debtor to render the fund available, does not operate as an equitable assignment of the fund to the creditor. *Christmas* v. *Griswold*, 8 Ohio St., 558; *Ford* v. *Garner*, 15 Ind., 298; *Pearce* v. *Roberts*, 27 Mo., 179; *German Nat. Bank* v. *First Nat. Bank*, 53 Neb., ——, 75 N. W., 531. In *Christmas* v. *Russell*, 14 Wall., 69, the rule is stated in this language: 'A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund, even in equity. To make an equitable assignment there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the party meant to be provided for, even where the circumstances do not admit of its immediate exercise.

If the holder of the fund retain control over it, as ex gr. power on his own account, to collect it or to revoke the disposition promised, this is fatal to the thing as an equitable assignment.' The averments of Morse & Company's petition fall far short of bringing them within the doctrine of an equitable assignment. No part of the moneys due from the United States was set aside for the payment of Morse & Company's claim. Notwithstanding the promise made by Welshans & Company to pay Morse & Company's claim out of the moneys which might be paid them by the United States, as soon as the boilers were accepted and put in place, Welshans & Company at no time parted with their control and right of disposition of the money coming from the United States; nor did they, by an order or otherwise, invest Morse & Company with the authority to receive or collect these moneys or any part of them."

In *Hicks* v. *Roanoke Brick Co.*, 94 Va., 746, 27 S. E. Rep., 596, a sewer contractor agreed to pay for the brick used out of payments for the work received from the city. Judge Riely said:

"But a mere promise or agreement to pay a debt out of a designated fund, when received, does not give an equitable lien upon the fund, or operate as an equitable assignment of it. Something more is necessary. To constitute an equitable assignment, there must be an assignment or transfer of the fund, or some definite portion of it, so that the person owing the debt or holding the fund on which the order is drawn can safely pay the order, and is compellable to do so, though forbidden by the drawer. 3 Pom. Eq. Jur., Sec. 1280; 1 Jones, Liens (2nd Ed.), Secs. 48, 50, 52; *Rodick* v. *Gandall*, 1 De Gex. M. & G., 763; *Clayton* v. *Fawcett's Admrs.*, 2 Leigh, 19; *Eib* v. *Martin*, 5 Leigh, 132; *Christmas* v. *Russell*, 14 Wall., 69; and *Trist* v. *Child*, 21 Wall., 441.

Patterson gave no order to the brick company on the city of Roanoke, which was to become his debtor for the construction of the sewers, for the latter to pay to the former for the brick it furnished to him. He did not assign or transfer to it for such purpose any part of the fund thus to become due to him. The agreement upon which it relies for the creation of an equitable lien in its favor is a mere promise by the Fidelity Loan & Trust Company to pay when and as it collected from the city the money it would owe Patterson. This did not operate as an equitable assignment. It gave to the brick company no control of the fund, and the company acquired no lien on it. * * *"

In *Hossack* v. *Graham*, 20 Wash., 192, 55 Pac. Rep., 36, 37,

in denying a claim of an equitable assignment under agreement to set aside for a debt 25 per cent of the proceeds of the sales of certain lots, Judge Dunbar said:

"In discussing the doctrine of equitable assignments in his work on Equity Jurisprudence (section 1284, and notes), Mr. Pomeroy says: 'The order on a future fund, which thus operates as an equitable assignment, should be carefully distinguished from a mere promise to appropriate an existing or future fund in discharge of an obligation, or a mere promise to give an order on a fund, and the like.' In this case there was no order on a future fund, but it was a mere promise to appropriate a future fund in discharge of an obligation. See also Beach, Mod. Eq. Jur., Sec. 291. * * * "

*Silent Friend Mining Co. v. Abbot*, 7 Colo. App., 73, 42 Pac. Rep., 318, 319, 320, was almost this case, for there an agreement was made to pay a debt out of the proceeds of ore to be mined by the debtor. Thompson, J., said:

"The ore belonged to the company. It extracted, shipped and sold it, and, when it received the price of its ore, the money was its own. The agreement gave the plaintiffs no interest in the money as such. It was simply a promise by the company that, when it received the money, it would apply it in payment of the debt; and, until it should do so, no title in the money could pass to the plaintiffs. If it failed in the fulfillment of its promise, the plaintiff's remedy was by an action at law against the company for breach of contract.

As to what does, and what does not, constitute an equitable assignment of a fund, there has been considerable adjudication. In Bradley's case, Ridg. t. Hardw., 194 (decided in 1744), the chancellor held that a promise to pay the plaintiff's demand out of a specific debt did not create a lien upon the debt, saying: 'It is common for persons who have expectations from the deaths of their friends to promise to pay their debts out of such legacies; yet such promises will not bind such legacies specifically, notwithstanding such creditors might think they had a right to such an express lien by virtue of their forbearance.' In *Christmas' Admr. v. Griswold*, 8 Ohio St., 558, the agreement was that Christmas should pay Fassett $7,435 out of the first money he should receive from sales of certain lands, etc. The court said that the contract could not operate as an equitable assignment, and created no lien in favor of Fasset's estate upon Christmas' share of the proceeds of the lands; quoting the following from Hare & Wallace's notes

to Leading Cases in Equity: 'It is necessary, moreover, in order to constitute an assignment, either in law or equity, that there should be such an actual or constructive appropriation of the subject-matter assigned as to confer a complete and present right on the assignee, even when the circumstances do not admit of its immediate exercise. A covenant on the part of the debtor, to apply a particular fund in payment of the debt as soon as he received it, will not operate as an assignment, for it does not give the covenantee a right to the funds, save through the covenantor, and looks to a future act on his part as the means of rendering it effectual.' * * *"

(4) BANKRUPTCY GAVE NO HIGHER RIGHT TO INTERVENORS.

So much has been written upon the theory that there was no equitable assignment even if a solemn contract had been made by the debtor to pay for advances out of coal to be by it mined in the future. In other words had there been no bankruptcy, the alleged agreement created nothing more than a general debt enforcible at law. So it was recognized and expressly decided in *ex parte Tremont Nail Co.*, 24 Fed. Cas., 183, 184, No. 14168, where it was sought in bankruptcy to establish an equitable charge because the bankrupt obtained credit upon a promise to pay the debt out of moneys to be by him collected from a customer for whom he was filling a large order. So the question was presented in *Silent Friend Mining Co.* v. *Abbott*, 7 Colo. App., 73, 42 Pac., 318, 320, where the court held that no equitable charge arose out of an agreement to pay a debt out of the proceeds of ore to be mined in the future. The court, among other things, said:

"Counsel seem to be impressed with the idea that the adjudications have been, for the most part, in cases where the rights of third parties were involved, and that the decisions were in some manner affected by that consideration. We do not find such to be the case. Their doctrine clearly is that an agreement like the one before us does not operate as an assignment at all. A claim, otherwise valid and enforcible, may be postponed or defeated by intervening outside rights, but here the plaintiffs had no claim whatever against the fund, and they mistook their remedy when they invoked the aid of a court of equity * * *"

Therefore, if bankruptcy had not ensued, the claim of the

railway company could not have been imposed as an equitable charge upon the property; hence irrespective of every other question in the case, intervenors were not entitled to prevail, nor the railway company to a preferential allowance.

## III.

**Respective theories as to the alleged modification of the written contracts.**

(1) THEORIES OF APPELLEES.

The theories upon which appellees have proceeded are:

(a) The oral arrangement between the Mount Carmel and the railway companies, whereby money was advanced by the railway company to be deducted from future bills to be rendered by the Mount Carmel Company, entered into, formed a part of, and modified the original written lease made by the Mount Carmel Company with intervenors, and that a failure on its part to comply with its obligations to the railway company in respect to repayment of such advances established a right in favor of the *other* two parties to the contract to rescind same.

(b) Because the oral arrangement entered into and formed a part of the original written contract, the obligation to repay the advances made by the railway company became a burden inseparably attached to the original contract, insomuch, that upon the adjudication in bankruptcy of the Mount Carmel Company it became incumbent upon the receivers and trustees to elect, to reject, or else to wholly assume the written contract as modified orally with the burden of repaying to the railway company the advances made by it.

No doubt can exist that this was the position of the intervenors in the District Court, because Judge Pollock (Rec., 107) said:

"At the oral argument and in the written briefs filed on behalf of petitioners any and all claim of subrogation to the rights of the miners whose demands were paid off and discharged out of the money advanced by the railway company is disclaimed by petitioners. Also, any and all right of petitioners to preferential payment of the money so advanced out of the bankrupt estate is as expressly and positively disclaimed. The sole insistence of petitioners in this court is, that as between the bankrupt and the petitioners the written contract was, before the institution of the proceedings in bankruptcy, modified by an oral agreement entered into when the money was advanced, that the bankrupt was in the months of July and August, 1905, to deliver to the railway company, coal at the prices named in the contract sufficient to discharge the obligation incurred by the bankrupt to the railway company on account of the advances made; that such oral modification entered into and formed a part of the contract between the parties at the date of the institution of the bankruptcy proceedings in this court and the appointment of the receivers. * * *"

At no time by exception (Rec., 22) or assignment of error (Rec., 114) was the correctness of this statement in anywise challenged.

The prayer of the intervening petition (Rec., 35, 36) was only:

"* * * that J. E. Hurley, Cyrus Leland and Walter Reeves, receivers appointed in the above entitled proceedings in bankruptcy, be directed either to deliver to said the Atchison, Topeka & Santa Fe Railway Company an amount of coal sufficient to carry out the provisions of the contract hereinbefore set forth, as modified by the verbal contract between the said Mount Carmel Coal Company and the Atchison, Topeka & Santa Fe Railway Company, as hereinbefore set forth; or that said receivers be ordered and directed to deliver over the possession of all the lands and properties described in said written contracts hereinbefore set forth, upon the payment to said receivers of the amount provided to be paid to said Mount Carmel Coal Company under the terms of said leases, and that the property of said Mount Carmel Coal Company, for which said payment is made, be at the same time turned over to said Cherokee & Pittsburg Coal and Mining Company, the Osage Carbon Company and the Atchison, Topeka & Santa Fe Railway Company, in full compliance with the terms and provisions of said contract."

In disclaiming (Rec., 107) any right to a preference, in join-

ing the Cherokee and Osage companies as intervenors when neither was a party to nor interested in the alleged verbal modification, and in seeking, as did the petition (Rec., 35, 36) not to recover any debt but a cancellation of the lease for a violation of its terms as modified, it is manifest that the intervenors made their entire case rest upon the proposition that there was a modification of the written contract. Hence if there was no such modification they have no case.

(2) THE FINDING OF THE REFEREE.

The referee (Rec., 108) accepted the issue thus tendered by intervenors and expressly found that no modification of the written contract was made or intended to be made, his language in this regard being:

"I am unable to find any testimony indicating an intention to modify the written lease as claimed by petitioners. There certainly was no express oral agreement to that effect. It is true, the advances were to be repaid by money due the coal company for coal furnished the Santa Fe Company, and the money, instead of being paid under the terms of the written contract, would be kept to reimburse the Santa Fe Company for money advanced. But this amounts to the same thing as saying that the Santa Fe Company merely paid for its coal in advance, although not required to do so by the terms of the contract. I cannot construe this to mean that the written contract was necessarily modified by the agreement to advance moneys to meet the payrolls. I regard the verbal agreement as a separate, independent, parol contract, in no respect inconsistent with the written contract. I am of the opinion that it did not become a part of the main contract by express agreement or necessary implication, and that the Santa Fe Company is not entitled to a cancellation of the lease on account of a failure to furnish coal to pay advances made to meet payrolls."

(3) THE FINDING OF THE DISTRICT COURT.

Judge Pollock in the District Court, in confirming the referee's finding (Rec., 109), said:

"First, I am of the opinion the transactions by which the money was advanced by the treasurer of the railway company to

the bankrupt were completed transactions, by reason of which the bankrupt became indebted to the railway company for so much money, and that such transactions are wholly independent of, separate and apart from the original contract between the parties. True, at the time the sums of money were advanced it was no doubt contemplated and agreed by the parties that the bankrupt would repay the money by furnishing coal at the price of the coal measured in money by the terms of the contract and would furnish such coal during the months of July and August as claimed. But at the time of the failure of the bankrupt the coal remained in the ground, unmined. None had been raised and none set apart as a fund to pay the debt. The contracts under which the money was advanced created no lien upon any property for its repayment. The railway company simply advanced to the bankrupt company money to enable it to meet its engagements arising out of the transaction of its business and charged interest thereon to be settled and paid in coal at a future date and at a fixed price. It is not contended any agreement was made by which the railway company bound itself to make like advances in future should the occasion arise. The transaction in its legal significance is not different from that had a bank or other person furnished the money, taken the obligation of the bankrupt to repay at a future time with interest. In such case the bank would have a perfect legal demand for repayment of money but would be simply a contract creditor of the bankrupt, holding a general unsecured claim against the estate in the hands of the receivers or trustees. * * *"

The learned judge, after a review of the authorities (Rec., 110, 112) also held (Rec., 112) that if there had been a written modification of the contract just as alleged it would not have given any right to cancel the original lease because no such privilege was reserved by the alleged modifications. His conclusion (Rec., 112) was thus expressed:

"In the light of these authorities, I am persuaded, had the subsequent independent contracts for advancements made entered into and formed a modification of the original lease, as claimed by petitioners, its non-performance by the bankrupt or the failure of the receivers or the trustees to perform in accordance with its terms would not work a forfeiture of the lease, because the parties at the time of the making of the lease expressly stipulated the breach of what conditions therein written should work a forfeiture of the lease, and made no stipulation regarding the advancement of money by the railway company to the bankrupt as was thereafter done. When the new agreement for such advancements was

made it was not then stipulated the failure to repay such advances according to the terms of the subsequent agreement should work a forfeiture of the lease."

His opinion was based upon well settled principles of law applied in the many authorities cited by him, quotations from which are hereinafter set out.

(4) View of the Circuit Court of Appeals.

The views adopted by the majority of the Circuit Court of Appeals (Rec., 122, 129) were: (a) As the parties agreed (Rec., 123, 124) that all advances by the railway company were to be repaid with coal to be subsequently mined by the bankrupt from mines in its own possession, this made (Rec.,125) an equitable assignment and charge upon the property; (b) the statute of frauds did not invalidate the equitable assignment because the advances having been made the contract was partially performed; (c) the trustees in bankruptcy obtained no higher rights than the bankrupt (Rec., 127) and hence when (Rec.,128) they continued the operation of the mine they must have done so under the written contract as orally modified; (d) inasmuch as the leases expired before the decision so the property could not be surrendered, the claim for advances (Rec., 129) was ordered to be paid as a preferential demand. The court thus based its opinion entirely upon the proposition that the written contract had been orally modified, so that if wrong upon that proposition the whole opinion fails.

As to the alleged oral modification of the written contract, it was (Rec., 124, 125) said:

"It appears that the coal company, while the contract was still in force and being executed, became embarassed and unable to meet its payrolls; as a result it might not be able to mine or deliver the coal which it had agreed to mine and deliver to the railway company, and which the latter imperatively required for its daily consumption. In this state of things the railway company agreed to waive its right to withhold payment for fifteen days after coal was delivered to it and pay for some of it before it was delivered; and the coal company agreed, as found by the trial court, to repay such advances, not in money, but in furnish-

ing coal in the months of July and August following, at the price fixed by the original contract. This arrangement made when the coal company was in embarassed circumstances and obviously inspired by the necessity of meeting the payrolls and for the ultimate purpose of securing performance of the only part of the original contract in which the railway company was interested, namely, securing its supply of coal, is so intimately and vitally related to the original contract that we are unable to agree with the trial court that it was intended to be independent and separate from it. It was not, in our opinion, a modification of any of the substantive provisions of the contract, but was a change rendered necessary by subsequent events in the method of its execution only. It was an arrangement in no manner inconsistent with any of the provisions of the original contract, but only in aid of its execution."

## IV.

**However, had there been a modification of the contract exactly as alleged, written out and attached to the original contract, there could have been no cancellation of the lease.**

(a) This proposition is sound for the reason already given that since the property out of which the debt was to be paid was left in the custody of the debtor, there was no equitable assignment or charge.

(b) Judge Pollock in the District Court said that "all right * * * to preferential payment * * * is * * * expressly and positively disclaimed," (Rec., 107) and as an independent ground for denying relief held that there having been no reservation of the right of re-entry for a breach of the modified agreement there was no right to a surrender of the property which was the only relief sought. His opinion upon this subject (Rec., 110, 111) was unanswerable and reads:

"Again, as has been seen from the facts stated, the written agreement of lease made among the parties definitely and positively specifies the acts of omission or commission which shall work a forfeiture of the lease, and also definitely and positively states the time and manner in which such forfeiture shall be declared and

enforced by the party or parties injured by the default of the other. It is now sought by petitioners not alone to engraft upon the written lease a new contract or agreement between the parties of which no mention is made in the writing, but also by reason of the breach of such new obligation thus created to have the court order a performance of the obligation which would work a preference in favor of the railway company over the other creditors of the bankrupt (the right to which preference is by the railway company expressly disclaimed), or to decree a forfeiture of the lease on a ground neither specified therein in writing nor claimed to have been made as a part of the oral agreement. To my mind this may not be done, and for this reason: Suppose, for the sake of argument, the agreement made between the railway company and the bankrupt to repay the advances made in coal in future at the rate specified in the contract had by consent of all the parties thereto been endorsed upon or written into the lease, and this obligation had from that time forth formed a part of the written lease, and as in this case had not been performed by the receivers or trustees, would such failure be good ground for forfeiture of the lease? I think not. In the making of the lease as written, the parties agreed the breach of certain conditions therein stated should work a forfeiture. It was not agreed at that time any money should be advanced by the railway company to the bankrupt to be repaid in future in coal, hence of necessity it was not agreed a failure to so repay any advances made would work a forfeiture of the lease. When such agreement for advances was subsequently made no forfeiture for failure of performance of this new covenant was expressly stipulated among the parties, and none can be implied. It would simply be a new and independent agreement or covenant engrafted on the lease, the breach of which would have rendered the bankrupt liable to an action by the railway for repayment, had bankruptcy proceedings not intervened, but would not be such a breach of condition as would work a forfeiture of the entire lease as to all parties, because it was not so stipulated and agreed."

The authorities sustain this view. In 18 A. & E. Enc. of L., 2nd ed., 369, it is said:

"The common-law rule is well settled that a breach by the lessee of his covenants or agreements in the lease does not work a forfeiture of the term in the absence of an express stipulation in the lease or the reservation of a power of re-entry in case of such breach. The general remedy of the lessor in such a case is merely by action for the recovery of damages. This rule applies with regard to implied covenants; express covenants, to pay rent; covenants to pay taxes; covenants not to assign or sub-let."

*In re Hague* v. *Ahrens*, 53 Fed., 58, 60, it was said:

"The law regards conditions with the same disfavor it does forfeitures; and for similar reasons. A clause will not therefore be treated as a condition if it can be construed a covenant without violence to its terms. If the purpose to create a condition, or conditional limitation, is not expressed in clear, unequivocal language—as the courts have frequently said in 'apt terms,' such as 'upon condition,' 'provided nevertheless,' 'so long as,' 'during,' etc. —the clause will be treated as a covenant, simply. The provision under consideration does not contain such language. The terms, 'This lease shall not be sold, assigned, or transferred, without the written consent of the party of the first part,' convey no suggestion even that the lease may be lost by such transfer. They express simply an agreement by the lessee, who alone could make the transfer, that he will not do it. If the lessor was not satisfied with the remedy which the law affords for breaches of such agreements, he should have stipulated for another by adding terms of condition or forfeiture. That he knew very well how to do this, and had it in mind, as respects breaches of other provisions of the lease, is shown by the following clause: 'A failure to pay the money after demand made, or put down the well, as hereinafter stipulated, shall forfeit this lease within one year from the date hereof.' The inference is strong, therefore, that he did not contemplate similar consequences as a result of a transfer."

To like effect are: *In re Pennewell*, 119 Fed., 1391; *Doe* v. *Godwin*, 4 Maule & S., 265; *Crawley* v. *Price*, L. R., 10 Q. & B., 302; *Den* v. *Post*, 25 N. Y. Law, 285; *Spear* v. *Fuller*, 8 N. H., 174; *Wheeler* v. *Dascombe*, 3 Cush., 285; 1 Washb. Real Prop., Sec. 504.

## V.

**There was, however, no verbal modification of the written contract.**

(1) INTERVENORS TO PREVAIL MUST SHOW THAT THERE WAS A MODIFICATION.

As already shown, intervenors based their entire claim upon the proposition that the original contract had been orally modified so as to pledge as security coal to be mined in the future. They

disclaimed any equitable preference, and as a method of collecting a debt, sought only to cancel the written contract unless the trustees would elect to comply with the alleged oral modifications thereof, upon the theory that the oral modification became part of the written contract. So the majority opinion of the Circuit Court of Appeals, in order to charge the trustees, had to assume that the contract was orally modified, for it was (Rec., 128, 129) there said:

"Any valid modification of the written contract which may have been made by the bankrupt before adjudication, whether oral or in writing, and whether known or unknown to the trustees, are binding upon them if they elect to assume and perform the contract. * * * After presumably making all the inquiries necessary to fully acquaint themselves as to the advisability of taking over the executory contract in question the trustees in this case determined to do so, assumed the contract and entered upon its execution. They mined the coal, delivered it to the railway company, and, in the language of the trial court, 'performed fully all the terms of the contract as it was written' but failed to conform to the condition created by the oral agreement to deliver coal to the railway company in payment of the advances made by it to keep the mine going."

If, therefore, there never was any modification of the written contract the whole foundation of the claim must fall; that there was not is plain for several reasons now about to be suggested

(2) ALL THE PARTIES TO THE WRITTEN CONTRACT DID NOT JOIN IN THE ALLEGED MODIFICATION.

The parties to the written contracts (Exhibits A, B, C, D,, Rec., 36, 37) were not only the bankrupt and the railway company, but also the Osage and Cherokee companies. Neither by the allegations of the interventing petition (Rec., 34) nor the proof offered (Ev. Wellman, Rec., 72, 86) was there any pretense that either the Osage or Cherokee company was a party to the modification. It follows, therefore, that a written contract to which there were *four* parties was not, and could not have been

intended to be modified by an oral agreement between *two* of them.

There was in the Circuit Court of Appeals some suggestion that the railway company was in reality the same as the Osage and Cherokee companies. There is nothing in the pleadings or evidence to warrant such a suggestion. Portions of the inventory (Rec., 7, 18) in bankruptcy not offered in evidence nor referred to at the trial, were for some undisclosed reason incorporated in the transcript and at one place therein there is (Rec., 11) this recital:

"This company owns no real estate or coal deposits, but is simply an operating company, which has for 8 years past worked under contracts and leases with the Atchison, Topeka & Santa Fe Railway Company, and said railway company's *affiliated* coal companies—the Cherokee & Pittsburg Coal & Mining Company and the Osage Carbon Company. Operations are still carried on under the agreements referred to in extracting coal from lands owned by the last named coal companies, and from coal deposits owned jointly by the said Cherokee company and Crawford County Coal Company."

Even had some kind of an affiliation been proven or even the ownership of all the stock of these companies been shown to be in the railway company, this would not have affected the question, as these corporations were distinct legal entities and would not have been in the eyes of the law either owned or controlled by the railway company. In *Pullman's Palace Car Co. v. Mo. Pac. R. Co.*, 115 U. S., 587, 597, 29 L. Ed., 499, 501, 502, Mr. Chief Justice Waite said:

"We are also of the opinion that the railroad of the St. Louis, Iron Mountain and Southern Company is not controlled by the present Missouri Pacific Company in such a way as to require that company to haul the Pullman cars over it, if the contract is binding on the new company to the same extent it would be on the old were that company still in existence and standing in the place of the new. Confessedly the St. Louis, Iron Mountain and Southern Company keeps up its own corporate organization. It operates its own road, it has its own officers and makes its own bargains. The Missouri Pacific owns all, or nearly all, its stock, and in that way can determine who shall constitute its board of directors; but there

the power of that company over the management stops. The board when elected has controlling authority, and for its doings is not necessarily answerable to the Missouri Pacific Company. The two roads are substantially owned by the same persons and operated in the same interest, but that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific."

This doctrine has been repeatedly approved even in stronger language. (*Porter* v. *Pittsburg, etc., R. Co.*, 120 U. S., 649, 30 L. Ed., 830; *Humphreys McKissack*, 140 U. S., 304, 35 L. Ed., 473, 475; *Jessup* v. *Ill. Central R. Co.*, 36 Fed. Rep., 735, 741; *American Preserves Co.* v. *Norris*, 43 Fed. Rep., 711, 714; *Electric R. Co.*, v. *Jamaica, etc., R. Co.*, 61 Fed. Rep., 655, 678; *Exchange Bank* v. *Macon, etc., Co.*, 97 Ga., 7, 25 S. E. Rep., 326, 328; *White* v. *Pecos Land, etc., Co.*, 18 Tex. Civ. App., 637, 45 S. W. Rep., 207, 209.)

(3) FINDINGS BELOW AND THE WEIGHT TO BE ATTACHED THERETO.

The referee expressly found (Rec., 108):

"I am unable to find any testimony indicating an intention to modify the written lease as claimed by petitioners. There certainly was no express oral agreement to that effect. It is true, the advances were to be paid by money due the coal company for coal furnished the Santa Fe Company, and the money, instead of being paid under the terms of the written contract, would be kept to reimburse the Santa Fe Company for money advanced. But this amounts to the same thing as saying that the Santa Fe Company merely paid for its coal in advance, although not required to do so by the terms of the contract. I cannot construe this to mean that the written contract was necessarily modified by the agreement to advance money to meet the payrolls. I regard the verbal agreement as a separate, independent, parol contract, in no respect inconsistent with the written contract. I am of the opinion that it did not become a part of the main contract by express agreement or necessary implication, and that the Santa Fe Company is not entitled to a cancellation of the lease on account of a failure to furnish coal to pay advances made to meet pay-rolls."

Judge Pollock, in the District Court (Rec., 109), thus approved the finding of the referee:

"From a careful reading of the record in this matter and consideration of the briefs and arguments of solicitors, in my judgment the conclusion reached by the referee is right and should be confirmed, and this for many reasons. First, I am of the opinion the transactions by which the money was advanced by the treasurer of the railway company to the bankrupt were completed transactions, by reason of which the bankrupt became indebted to the railway company for so much money, and that such transactions are wholly independent of, separate and apart from the original contract between the parties. True, at the time the sums of money were advanced it was no doubt contemplated and agreed by the parties that the bankrupt would repay the money by furnishing coal at the price of the coal measured in money by the terms of the contract and would furnish such coal in the months of July and August as claimed. But at the time of the failure of the bankrupt the coal remained in the ground, unmined. None had been raised and none set apart as a fund to pay the debt. The contracts under which the money was advanced created no lien upon any property for its repayment. The railway company simply advanced to the bankrupt company money to enable it to meet its engagements arising out of the transaction of its business and charged interest thereon to be settled and paid in coal at a future date and at a fixed price. It is not contended any agreement was made by which the railway company bound itself to make like advances in future should the occasion arise. The transaction in its legal significance is not different from that had a bank or other person furnished the money, taken the obligation of the bankrupt to repay at a certain time with interest. In such case the bank would have a perfect legal demand for repayment of the money, but would be simply a contract creditor of the bankrupt, holding a general unsecured claim against the estate in the hands of the receiver or trustees."

Great weight should be attached to a finding of the referee thus approved, the case being analagous to a finding of fact by a master approved by the Circuit Court, and in that situation reaching the appellate tribunal. The rule in such instances has often been stated.

In *Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co.*, 62 C. C. A., 351, 127 Fed. Rep., 625, 633, Judge Richards said:

"The principal contention is the charge of fraud. Since this involved disputed questions of fact upon which the master and the

court below agreed, there must, under the rule, be a very plain showing of mistake to authorize us to go behind the report as confirmed by the court. * * *"

In *Buckingham* v. *Estes*, 63 C. C. A., 20, 128 Fed. Rep., 584, 587, Judge Lurton said:

"The master and the court below concurred in the finding of facts, and when that is the case this court will not reverse or modify, unless a very plain mistake is definitely pointed out. * * *"

In *Last Chance Mining Co.* v. *Bunker Hill, etc., Co.*, 66 C. C. A., 299, 131 Fed. Rep., 579, 587, 588, Judge Ross said:

"Findings of fact made without any evidence to support them may, and should, as a matter of course and of law, be disregarded; but findings made by a master in pursuance of an order to take the proofs and report the facts and conclusions of law to the court, that depend upon conflicting testimony, or upon the credibility of witnesses, especially as in the present case, they are approved by the trial court, will not be disturbed. * * *"

In *Crawford* v. *Neal*, 144 U. S., 585, 596, 36 L. Ed., 552, 557, Mr. Chief Justice Fuller said:

"The cause was referred to a master to take testimony therein, 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. * * *"

Mr. Justice Brewer subsequently (*Furrer* v. *Ferris*, 145 U. S., 132, 36 L. Ed., 649) quoted the language with approval, and it has become the settled rule of this jurisdiction. (*Simpson's Patent Dry Dock Co.* v. *Atlantic, Etc., Co.*, 47 C. C. A., 443, 108 Fed. Rep., 425; *Ferguson Contracting Co.* v. *Manhattan Trust Co.*, 55 C. C. A., 529, 118 Fed. Rep., 791.)

3. IMPROBABILITY OF THE ORAL ARRANGEMENT.

A good reason for saying it was improbable that the parties ever intended to so orally modify the written contract as to create

an equitable charge or assignment, is found in the *written* modification of August 30, 1900 (Rec., 67), while the alleged practice of making advances was in force (Rec., 78) which made this provision:

"Ninth: The Mount Carmel Company shall, upon the execution of this agreement, give a good and sufficient bond in the sum of one hundred thousand dollars ($100,000) for the full and faithful performance of its covenants and agreements under said agreement of October 1st, 1896, and said supplemental agreement of June 1st, 1898, and these presents, which bond shall be signed by at least three sureties, each of whom shall be satisfactory to the president and treasurer of the railway company, and upon the execution and delivery of said bond, the coal companies and the railway company shall cancel, surrender and deliver to the Mount Carmel Company any bond heretofore executed by it or by said Charles J. Devlin in that behalf."

It is almost inconceivable that the Mount Carmel Company should give a bond of one hundred thousand dollars, with sureties satisfactory to the railway company, to secure the payment of any obligation upon its part and then be required thereafter orally to agree to assign the coal which it should mine in the future, especially when prior thereto there had been in existence a custom of making such advances; it is absolutely inconceivable in such circumstances to believe that the parties intended to make any oral pledge or assignment.

(4) THE ALLEGED ORAL MODIFICATION MUST HAVE BEEN CLEARLY PROVEN.

(*a*) To prove such an oral modification of a written contract as would result in an equitable assignment or charge, "it is most important to have clear and satisfactory evidence as to the exact words used." Such was the view as expressed by Lord Justice James in *Thompson L. R.*, 5 Ch., 659, and approved by Mr. Justice White in *Fourth Street Bank* v. *Yardley*, 165 U. S., 634, 649, 41 L. Ed., 855, 863, the case relied upon by the Circuit Court of Appeals. There are additional reasons for such a rule to be applied in this case.

(*b*) The Kansas Statute of Frauds (Comp. Laws of Kan., 1905, Sec. 3255) provides:

"No leases, estates or interests of, in or out of lands, exceeding one year in duration, shall at any time hereafter be assigned or granted, unless it be by deed or note, in writing, signed by the party so assigning or granting the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

If the original contract had to be in writing, this statute likewise required any modification thereof to be also written. (*Bell* v. *Coffin*, 2 Kans. App., 337; *Emerson* v. *Slater*, 22 How., 28, 16 L. Ed., 360; *Warren* v. *Mayer Mfg. Co.*, 161 Mo., 112, 121.) The Circuit Court of Appeals said, however, that the parol contract here was taken out of the statute of frauds by part performance. In such case the settled rule (2 Jones on Ev., Sec. 436) is:

"It is not the province of the courts to make contracts; and it is a familiar rule that the party who relies on part performance as removing the bar of the statute of frauds must produce *definite and convincing proof as to the nature and terms of the oral contract on which he relies.* * * *"

In *Purcell* v. *Coleman*, 4 Wall., 513, 18 L. Ed., 435, 436, Mr. Justice Grier said:

"A mere breach of a parol promise will not make a case for the interference of a Chancellor. It is plain that a party who claims such interference has the burden of proof thrown on him He knows that the law requires written evidence of such contracts, in order to their validity. He has acted with great negligence and folly who has paid his money without getting his deed. When he requests a court to interfere for him and save him from the consequences of his own disregard of the law, he should be held rigidly to full, satisfactory and indubitable proof.

First—Of the contract, and of its terms. *Such proof must be clear, definite and conclusive*, and must show a contract, leaving no *jus deliberandi* or *locus poenitentiae*. It cannot be made by mere hearsay, or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witness had no reason to recollect from interest in the subject-matter, which may have been imperfectly heard, or inaccurately

remembered, perverted, or altogether fabricated; testimony, therefore, impossible to be contradicted."

In *McKinnon* v. *McKinnon*, 46 Fed. Rep., 713, 718, 719, Judge Philips said:

"The party relying upon such parol contract must make full, satisfactory and indubitable proof of the contract—a proof which must show a contract leaving no *jus deliberandi* or *locus poenitentiae*, and which cannot be made out by mere hearsay, or by evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, that the consideration has been paid. * * *"

In *Marr* v. *Shaw*, 51 Fed. Rep., 860, 864, Judge Sanborn said that the proof must be "full, clear and satisfactory."

In *Walcott* v. *Watson*, 53 Fed. Rep., 429, Judge Hawley said that it must be "certain and unequivocal in all its essential terms."

In *Semmes* v. *Worthington*, 38 Md., 298, it was said that in such case "the proof must be clear and explicit, leaving no room for reasonable doubt."

In *Langston* v. *Bates*, 84 Ill., 524, it was said that the contract "should be clear and certain in its terms and established by testimony of an undoubted character which is clear, definite and unequivocal."

(5) THE EVIDENCE DID NOT WARRANT THE FINDING OF ANY INTENTION TO MODIFY THE WRITTEN CONTRACT.

We approach this question bearing in mind that neither the Cherokee nor Osage Company was a party to the alleged oral modification, the presumption attending the findings of the referee and trial court, the fact that the Mount Carmel Company had given bond to secure its promises, and the rule that there must be clear, definite and convincing proof as to the exact words used before an oral modification can be found. It is claimed that the modification was arranged by Mr. Wilder, treasurer of the Railway Company, and Mr. Devlin of the Mount Carmel Company. Both are now dead. The only witness by whom it was attempted

to be proven was A. O. Wellman (Rec., 72-86), whose testimony deals in general conclusions without a single specific detail as to conversations or pointed statement of fact, and is wholly unsatisfactory, coming within the condemnation of Mr. Justice Grier in *Purcell* v. *Coleman*, 4 Wal., 513, 18 L. Ed., 435, 436. The extent to which it goes is this only: Devlin from time to time, in accordance with a custom in existence for years, had money advanced to him by the railway company, not to meet the pay-roll, but to pay debts to banks and thereby maintain a credit, upon which he, from time to time, borrowed money to meet his pay roll. His extended examination resulted in this (Rec., 86) statement:

"Q. Now, to summarize the statement you have made to Judge Smith, I understand you that Mr. Devlin, on instances, had borrowed from banks a certain amount of money, possibly to meet his pay-roll, and then when that note came due, and his next pay-roll must be met, he was not able to raise the money by further loans from those banks until he had paid for the notes he had negotiated at these banks, and that your company advanced the money to those banks and took up the notes and then they let Devlin have the additional money? That is a fact, is it? A. Yes."

The extent of the arrangement was not any specific arrangement, but a mere advancement of money, with the expectation of repayment by credits upon bills when settlements were made for coal delivered in the future. It was thus (Rec., 78, 79) stated:

"Q. As a matter of fact it was not a novel thing for the Santa Fe Railway to loan Mr. Devlin money, which he was supposed to subsequently pay by furnishing coal? A. We only furnished him money for pay-roll purposes.

Q. That was the practice indulged in by your office for a considerable length of time? A. Almost every time Devlin started in his mines we furnished him money for pay-roll purposes.

Q. At times you furnished larger sums of money than the amount set up in this exhibit, did you not? A. We have.

Q. Did you uniformly get interest on those loans you made Mr. Devlin? A. When we advanced in advance of settlement day,

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which I stated was the 15th of the succeeding month, we got interest.

Q. Was that a uniform practice also? A. Yes.

Q. There was nothing in connection with the particular items that were set forth as your charge in Exhibit "E" that differed from the general practice in the course of business you had been following with Mr. Devlin, practically ever since he had been in the coal business? A. Well, now, I don't exactly grasp your question.

Q. Whatever money you put up or loaned to Mr. Devlin on these three different occasions you mention in Exhibit 'E' was along the same general plan you had previously advanced him money on many occasions before that? A. These specific items here came to my mind forcibly, as I have stated, for this purpose.

Q. As I say, you had repeated that experience many times in the past with him? A. Yes.

Q. This is simply a continuation of a practice that had obtained between your company and Mr. Devlin's company many times before that? A. For pay-roll purposes, yes."

This method of advancement existed under the contract of October 1, 1896 (Ex. A, Rec. 37-57), which was thereafter upon June 1, 1898 (Ex. C, Rec. 58-63), and upon August 30, 1906 (Ex. D, Rec. 63-67), modified in writing, yet at neither time was a word inserted upon the subject of the alleged *oral* modification, though the writing of August 30, 1900 (Rec. 67), required the Mount Carmel Company to give a bond of $100,000 to secure its promises. The conversations between the parties were not detailed. The specific agreement alleged to make advances in May and June to be repaid in July and August was not even testified to. The verbal modifications, if any, never purported to modify or change the original contracts of lease. They provided for payment by the Railway Company on or before the 15th day of each month for all coal sold and delivered during the previous thirty days. The payment, therefore, by the Railway Company previous to the 15th of any month for coal already delivered was strictly in conformity to the terms of the original contract. The bills for coal delivered were not vouchered until the 15th of the month, but the deliveries were going on during the previous thirty days.

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While the Railway Company was not obliged to pay for the coal as delivered, yet it might do so under the contract, and it seems that, as an accommodation to the Mount Carmel Company, it was in the habit of so doing. The amounts of coal delivered from month to month varied, so that more money had at the time of the bankruptcy been advanced than was sufficient to pay for current deliveries and the account showed an over payment. The true state of facts warrants no inference further than this. All that is asked is that this court real the testimony of Mr. Wellman, who says there was no specific conversation or arrangement, or as shown (Rec. 78) at one place, only a *general* understanding of long standing:

"Q. In your testimony with reference to these conversations you have had with Mr. Devlin—in your testimony to Judge Smith did you have in your mind any particular time in which you said you had any conversation with Mr. Devlin? A. I understood the question was general, and the conversation general."

## VI.

**The trustees never elected to assume the alleged oral modification.**

(1) The majority opinion of the Circuit Court of Appeals (Rec. 128, 129) proceeded upon the theory that the trustees in bankruptcy must elect whether to adopt or reject existing executory contracts, and assumed that when they proceeded with the execution thereof they necessarily adopted same, hence by the mere operation of the mine, as a matter of law, must be held to have adopted not only the written contracts, but any unknown oral modifications thereof. This, however, was *obiter dictum* because it was said under the discussion of the subject whether the trustees in bankruptcy had any rights *superior* to the bankrupt. We undertake to say that if the argument was used for any other purpose, such a startling doctrine was never before expounded and not one of the cases cited in the opinion sustains the proposition. Besides

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the petition of intervention did not proceed upon that theory, but only sought to establish the alleged oral contract, and then compel the trustees to elect whether they would assume or reject the same.

(2) The trustees had no knowledge of the existence of the verbal modification. Cyrus Leland, one of them (Rec. 88, 89), testified:

"Q. Did you ever know there was any contention by the Santa Fe Railway Company that Mr. Devlin had attempted to make any verbal contract in any respect modifying any written lease? * * * A. No, I didn't. * * *

Q. You had never, or the receivers or trustees have never undertaken to carry out this alleged verbal agreement Mr. Devlin is supposed to have made prior to the receivership? A. I never knew anything about it."

Walter Reeves, another trustee (Rec. 90), testified:

"Q. I will ask you when, if ever, you heard of any claim of a verbal contract between the Santa Fe and the Mount Carmel Coal Company, or Mr. Devlin? A. Today for the first time."

Judge Pollock, speaking for the District Court, said "the alleged oral agreement" was "unknown to the receivers and the court at the time of their appointment."

The order upon the trustees, then receivers, made July 7, 1905 (Rec. 92), recited:

"* * * if the receivers fail to operate the mines owned by the Cherokee & Pittsburg Coal & Mining Company, in accordance with the provisions of the contract between said Cherokee & Pittsburg Coal & Mining Company, and the Mount Carmel Coal Company, then said Cherokee & Pittsburg Coal & Mining Company may at once take possession of said mines and operate the same as fully as if said lease had never been made."

This, by its very language, related not to the oral modification, but only to the written contract, because it referred to the contract to which the Cherokee and Osage Companies were parties and they had no part in the modifications. The intervention was never presented (Rec. 32) until November 20, 1905, and no steps ever taken to hurry the trial or advance its hearing in the Circuit Court of Appeals. It is, therefore, manifest that neither

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the trustees nor the District Court ever intended that there should be any assumption of the alleged oral modification. It is inconceivable to say that they elected to assume a contract the very existence of which they were at the time denying.

(3) It is equally certain that intervenors never claimed or intended to claim any such assumption because the intervening petition (Rec. 35, 36) was in reality one to establish the alleged oral modification and to put the trustees to their election whether to assume or reject same, because in it the lessors and the Railway Company asked the alternative relief that the trustees either pay the Railway Company for the advances or else give possession of the mines in accordance with the terms of the written lease. So, upon the trial in the District Court, after disclaiming any right to a preferential claim, the position assumed by the intervenors was to compel the trustees to elect to assume or reject the verbal modification. Judge Pollock then said (Rec. 107) of their position:

"Therefore, it is contended equity will not permit the trustees to now assume and carry out the terms of the contract as it stands written because by them deemed beneficial to the bankrupt estate, but that if the trustees elect to assume performance of the contract at all they must undertake it with all its burdens and must either furnish the coal agreed to be furnished by the bankrupt to the Railway Company in accordance with the terms of the claimed oral modification of the agreement, or forfeit all rights under the lease and surrender the leased premises to petitioners, and it is so prayed."

(4) Of course the trustees were put to their election as to whether they would or would not reject existing executory contracts, but as is the case with every other assignee, it was a question of what contract they were to make an election. Surely not one which was claimed not to exist. The court's order (Rec. 92) only related to the *written* contract. Intervenors sought only to compel an election to adopt or reject the oral contract. The Circuit Court of Appeals, however, said that by acting under the written contract they took subject to an oral modification of which

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they knew nothing and which they never intended to adopt. No authority has ever gone this far. The doctrine is absurd, and would put trustees to their peril in contesting the terms of existing arrangements.

It has been held that upon bankruptcy the trustee has the election whether he will adopt or reject the terms of an existing lease. (*Watson* v. *Merrill*, 69 C. C. A., 185, 136 Fed. Rep., 359, 363; *In re Chambers*, 98 Fed. Rep., 865; *Ex Parte Houghton*, 1 Low., 554, 12 Fed. Cas., 584, No. 6725.) The same principle applies to receiverships, and mere use of the property, no matter how long continued, does not operate as an election. This has been said too often to require discussion. (*Q. M. & P. R. Co.* v. *Humphreys* 145 U. S., 105, 113, 36 L. Ed., 640; *U. S. Trust Co.* v. *Wabash R. Co.*, 150 U. S., 287, 37 L. Ed., 1085; *N. Y. etc. R. Co.* v. *N. Y. etc. R. Co.*, 58 Fed. Rep., 268; *Ames* v. *U. P. R. Co.*, 60 Fed Rep., 966, 971.) There must, however, be a purpose and intention to assume the lease and become the assignee thereof (id.), otherwise there is no assumption. If one is put to an election he is never bound thereby until he knows the facts. Thus, in 2 Story Eq. Juris., 13th Ed., Sec. 1098, it is said:

"The general rule is that the party is not bound to make any election until all the circumstances are known and the state and condition and value of the funds are clearly ascertained; for until so known and ascertained it is impossible for the party to make a discriminating and deliberate choice, such as ought to bind him to reason and justice. If, therefore, he should make a choice in ignorance of the real state of the funds, or under a misconception of the extent of the claims on the fund elected by him, it will not be conclusive on him."

It is not therefore possible that because under an order of court the trustees acted under the *written* lease they became bound by an *oral* modification of which they never heard. So that, as the intervening petition conceded, there never was an election to assume the oral contract.

Probably all that was meant by the Circuit Court of Appeals was that the trustees had no higher rights than the bankrupt.

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None need be claimed. The alleged oral modification never did and never could create any equitable charge or lien against the property and therefore the trustees took it free therefrom. So, as a matter of fact, no oral modification of the written contract was made, hence nothing existed but the personal obligation of the bankrupt. As there was as between the Railway Company and the bankrupt no equitable charge against or lien upon the property, nor any burden upon the written contract, none could exist as between intervenors and the trustees, unless and until the latter elected to adopt the *oral* arrangement as a modification of the written contract, or at least until they elected to adopt the oral modification after it was found to exist.

## VII.

**The Circuit Court of Appeals had no right to allow the claim as preferential.**

(*a*) In the District Court intervenors disclaimed any right to a preference (Rec. 107), the record in this respect reciting:

"At the oral argument and in the written briefs filed on behalf of petitioners any and all claim of subrogation to the rights of the miners whose demands were paid off and discharged out of the money advanced by the Railway Company is disclaimed by petitioners. Also, any and all right of petitioners to preferential payment of the money so advanced out of the bankrupt estate is as expressly and positively disclaimed."

No preference was claimed by the prayer of the petition.

(*b*) The Circuit Court of Appeals (Rec. 129), however, said:

"From the foregoing the conclusion follows that the learned trial court should have sustained the intervenors' petition and surrendered to them the leased premises or required the trustees, upon the assumption of the lease, to perform the condition of mining and furnishing the Railway Compnay sufficient coal to cover its advances. Not having done so and the lease having expired so that

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it cannot now be done, the assets of the estate, consisting *in part* of money received for coal delivered to the Railway Company, should be subjected to the payment of such advances as a preferential claim."

Without any showing of the amount of money advanced which came into the hands of the trustees, an order of preference was made. No ground, therefore, existed. No reason can be given. Manifestly, if one could upon proper pleadings be given, it could not be in this case where there was no equitable charge against the property.

Respectfully submitted,

JOHN S. DEAN,
FRANK HAGERMAN,
*Solicitors for Appellants.*

TO EDGE

Office Supreme Court, U. S.
FILED.
JAN 27 1903
JAMES H. McKENNEY,
Clerk.

# The Supreme Court of the United States.

October Term, 1902.

E. Hoyt et al., Commissioners of Barbour County, Kansas, Appellants,
vs.
Mt. Carmel, Court Number,

No. 95.

Atchison, Topeka & Santa Fe Railroad Company et al.,
Appellees.

## Appellants' Suggestions in Reply.

Statement of the Case.

# In the Supreme Court of the United States

OCTOBER TERM, 1908.

No. 95.

J. E. HURLEY ET AL., TRUSTEES IN BANKRUPTCY OF THE ESTATE OF THE MT. CARMEL COAL COMPANY,
*Appellants,*

*v.*

ATCHESON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.,
*Appellees.*

## APPELLANTS' SUGGESTIONS IN REPLY.

(1) It is contended that the appeal in this case should be dismissed because: (*a*) There was no certificate of a Justice of this court as required by section 25*b* of the Bankrupt Act and the question involved is not one which, as provided by that section, might have been taken on appeal or writ of error from the Supreme Court of the state; and (*b*) there was no finding of fact as required by General Order XXXVI.

(2) The appeal was in fact taken under the Act of March 3, 1891 (26 Stat. L., 828; 4 Fed. Stat. Ann., 409), and not under the special provisions of the Bankrupt Act. Therefore, as decided in Hewit *v.* Berlin Machine Works (194 U. S., 296; 48 L. Ed., 986), there was the

right of appeal irrespective of section 25*b* and General Order XXXVI. Furthermore, no debtw as *presented* for allowance. Hence there was not the "allowing or rejecting a claim under this Act" within the meaning of section 25*b*, nor any "appeal *under* the Act" as provided for by the General Order.

(3) General Order XXXVI could not have been complied with because it requires findings of fact to be made and conclusions of law to be given *at the time* the case is decided. Up to the time of the decision below there had been no debt *presented* for allowance, the right asserted being solely one for the recovery of property. To say now that *after* a decision, a finding *might* have been obtained as of proper time, merely puts the right of appeal, absolute under the law, within the discretion of the court below and deals in speculation. No one can say whether the court below would have granted the request. It has been decided that a request must be made *before* decision (Knapp *v.* Trust Co., 162 Fed. Rep., 675).

(4) Savings Deposit Bank and Trust Company *v.* Loeser (209 U. S., 542), is, however, cited as conclusive. That appeal was from the case reported in 148 Fed. Rep., 975, 78 C. C. A., 597, where it appears that a debt secured by mortgage was *presented* for allowance, specific provision being made therefor by section 57*e* of the Bankrupt Act. Clearly then that was a matter for which *special* provision was made by the bankrupt law. Nothing appears in the report to show that the appeal was under the Act of March 3, 1891. When the case subsequently came before the Circuit Court of Appeals (163 Fed. Rep., 212), Judge Lurton, speaking of the first decision said: "Subsequently the case was taken by an appeal of the bank to the Supreme Court, where, upon April 7, 1908, the appeal was dismissed, without opinion. The mandate to this court recites only that the appeal was dismissed 'for the want of jurisdiction.' *It would be idle to speculate as to the grounds upon which this action was taken.*"

(5) It is probable that the appeal in the Loeser case (209 U. S., 542), was dismissed because solely taken under the Bankrupt Act or else because the decree was one of reversal, for Judge Lurton (163 Fed. Rep., 212, 216) subsequently said: "Manifestly the case did not overrule Hewit *v.* The Berlin Machine Works, 194 U. S., 296, 300; 24 Sup. Ct. Rep., 690; 48 L. Ed., 986."

(6) Here, however, because the decree was one of reversal, a dismissal of the appeal is not authorized, for these reasons:

(*a*) The language (Rec. 129) of the decree appealed from is

> "From the foregoing, the conclusion follows that the learned trial court should have sustained the interveners' petition and surrendered to them the leased premises or required the trustees, upon the assumption of the lease, to perform the condition of mining and furnishing the Railway Company sufficient coal to cover its advances. Not having done so and the lease having expired, so that it cannot now be done, the assets of the estate consisting in part of money received for coal delivered to the Railway Company, should be subjected to the payment of such advances as a preferential claim. The decree is accordingly reversed and the cause remanded with instructions to proceed according to this opinion."

There was no dispute as to the amount because the referee (Rec. 30, 31) found "the advances made by the Santa Fe Company, which are before the court for consideration, are three in number * * *. Various credits have been allowed against these advances, reducing the amount of petitioner's claims to $57,304.16." The trustees neither excepted to this finding, nor sought to review it. They are therefore bound thereby. Hence, there is not and has never been any dispute as to the amount due. The sole controversy now is as to the

preference which has been absolutely ordered. The decree is therefore final. This both sides concede. Even appellees do not desire a dismissal upon this ground.

(*b*) A decree is final if, as here, it directs a court below to proceed in accordance with the mandate (Merrill *v.* National Bank, 173 U. S., 171; 43 L. Ed., 640; Beasley *v.* Texas and P. R. Co., 191 U. S., 494, 48 L. Ed., 274), or remands with directions to dismiss (Tippecanoe County *v.* Lucas, 93 U. S. 108, 23 L. Ed., 822), or to enter a judgment upon special findings (Mower *v.* Fletcher, 114 U. S., 127, 29 L. Ed., 119).

(*c*) If, however, the appeal should be dismissed upon this ground it should be plainly stated so that after a retrial the case can again be brought here.

Respectfully submitted.

FRANK HAGERMAN,
*For Appellants.*

FILED.
DEC 28 1908
JAMES H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1908.

[redacted]

Appellants.

vs.

[redacted]

Appellees.

No. 95.

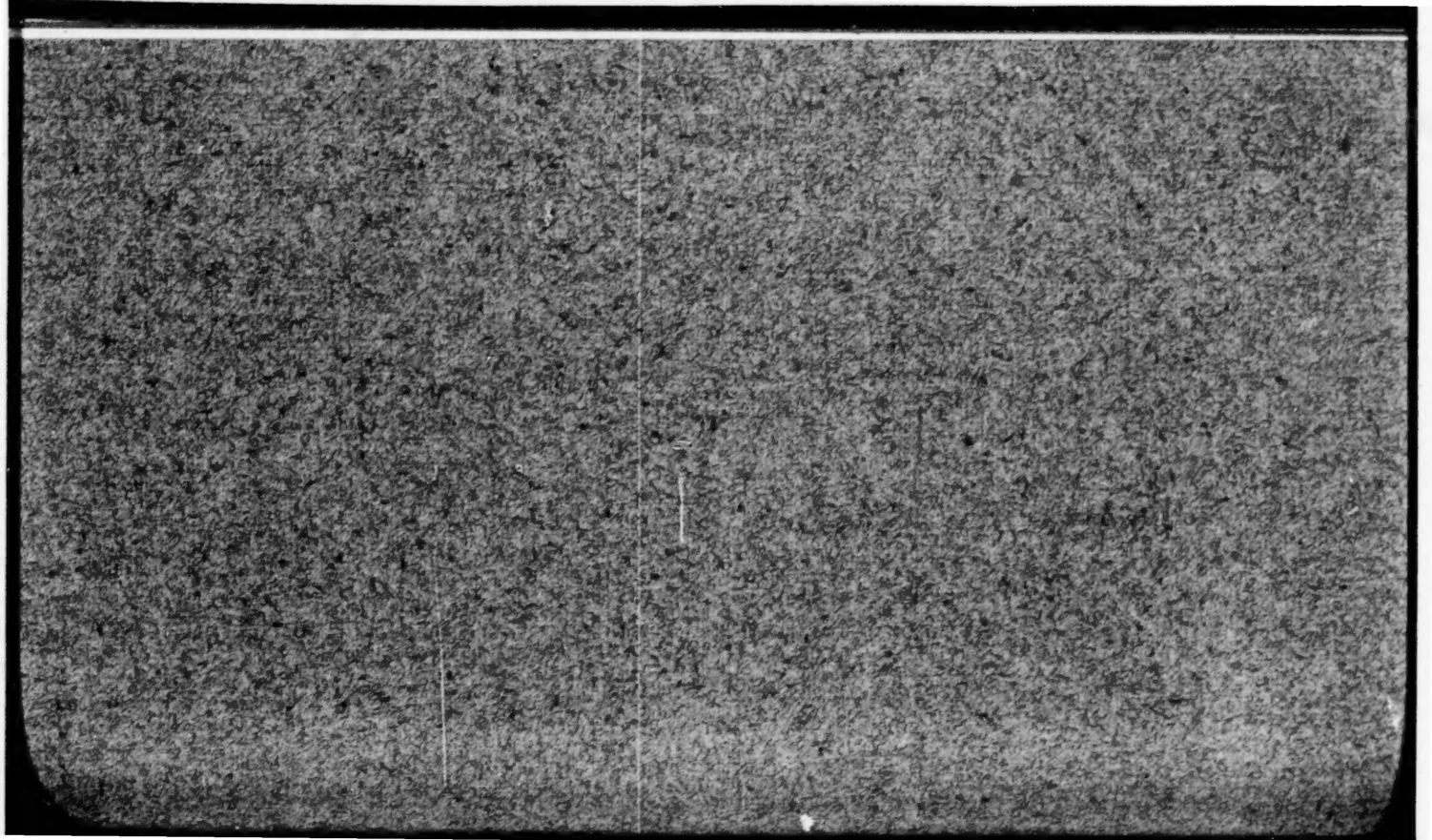
Appeal from United States Circuit Court of Appeals for the Eighth Circuit.

## APPELLEES' BRIEF.

[redacted]
Attorneys for Appellees.

[redacted]
Of Counsel.

[redacted]



IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

| | |
|---|---|
| J. E. HURLEY, CYRUS LELAND, JR., and WALTER REEVES, Trustees in Bankruptcy of the estate of the Mount Carmel Coal Company, Bankrupt,<br>*Appellants,*<br>*vs.*<br>THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COMPANY and CHEROKEE AND PITTSBURG COAL & MINING COMPANY,<br>*Appellees.* | No. 95.<br>Appeal from United States Circuit Court of Appeals for the Eighth Circuit. |

## APPELLEES' BRIEF.

The statement of our opponents is colorless, and in some respects inaccurate, though perhaps not designed. It omits some facts necessary to a correct understanding. The transactions involved were had between live, intelligent business men, and, to intelligently understand the facts, it will be necessary to set out the same in chronological order with the circumstances which surrounded the parties, and to place ourselves in the situation of the parties to the transactions involved.

The Osage Carbon Company and the Cherokee and Pittsburg Coal & Mining Company, affiliated with or controlled by the Railway Company, owned coal mines in Osage and Crawford Counties, Kansas. On October

1, 1896, these parties entered into a contract with Charles J. Devlin, a copy of which was attached to the intervening petition filed in the bankruptcy proceedings. This contract shows that the Osage Carbon Company gave to Devlin for a term of three years the right or license to mine, extract and sell coal from lands therein designated in Osage County, and the Cherokee and Pittsburg Coal & Mining Company granted him similar rights for the same period in respect to lands in Crawford County. Among other things Devlin agreed to pay certain rentals and royalties on the coal mined and to do certain other things as in the agreement specified in regard to opening and developing coal mines. In the 22nd Article of this agreement (Rec., 51 and 52) Devlin was obligated to sell and deliver to the Railway Company of coal so mined under the agreement all the coal required by it in the operation of its lines of railway in Kansas as far west as Newton (the Railway also having the option to take more coal for other lines), at the prices fixed in said agreement, which prices were to be varied or adjusted according to certain conditions therein specified in respect to wages of miners. (Rec., 53.) In the 17th Article (Rec., 49) provision was made by which either the "Coal Companies" (so designated in the agreement) *or* the Railway Company might terminate the agreement for failure of said Devlin to perform any of his obligations, covenants or agreements, if within thirty days after written notice of such failure and the nature thereof he did not cure such failure by performance satisfactory to the Railway Company and the "Coal Companies."

In Article 28 it was provided that neither the lease

and agreement nor any interest therein should be assigned by the said Devlin without the consent of the "Coal Companies" and the Railway Company given in writing by their respective presidents. (Rec., 55.)

As stated heretofore, the "Coal Companies" were controlled by the Railway Company and, as is apparent from a reading of the contract, one of the main purposes of the so-called lease and agreement was to secure to the Railway Company an adequate supply of coal needed by it for the operation of its railways, or, as stated in the opinion of the Circuit Court of Appeals (Rec., 124):

> "The clear intent and purpose of the main contract, so far as the Railway Company is concerned, was to make a reliable provision in advance for its daily necessities for a period of years,—a provision so important to the Railway Company itself and to the traveling public that it saw fit to secure and make it certain by stipulations giving it the right to veto any assignment of the lease or to declare a forfeiture of all the Coal Company's" (a subsequent assignee of Devlin's) "rights under the lease if it failed to observe its contract obligations."

With the consent of all parties Devlin subsequently assigned his interest under the lease and agreement to the Mount Carmel Coal Company, of which he was and at all times continued to be the president. Afterwards on June 1, 1898, a contract was made between the Osage Carbon Company, the Cherokee and Pittsburg Coal & Mining Company and The Atchison, Topeka and Santa Fe Railway Company with the Mount Carmel Coal Company extending for a further period all of the provisions of, and modifying in some particulars not important to this case, the first named agree-

ment. Afterwards on August 30, 1900, another contract was entered into by the Osage Carbon Company, the Cherokee and Pittsburg Coal & Mining Company and The Atchison, Topeka and Santa Fe Railway Company with the Mount Carmel Coal Company extending the provisions of the foregoing contracts, with some modifications not important in this litigation, until June 1, 1906. (Rec., 33 and 34.)

The transactions out of which this litigation arose were largely had with and were testified to by A. O. Wellman, Assistant Treasurer of the Railway Company. Mr. Devlin, the president of the Mount Carmel Coal Company had most of the dealings direct with Mr. Wellman as Mr. Wilder, the treasurer of the Railway Company, was absent from the office and Mr. Wellman was thoroughly cognizant of the transactions involved by reason of his position with the Railway Company. Owing to numerous objections interposed by the attorney for the trustees and the disconnected manner in which his testimony was given, it will be almost impossible to give extracts from his evidence; therefore to understand the true nature of the dealings had it will be necessary to read his entire testimony. The sum and substance of his evidence disclosed the following facts:

Almost from the beginning of the lease and agreement it had become the practice of Mr. Devlin as president of the Mount Carmel Coal Company to request the Railway Company to make advances to the Mount Carmel Coal Company on account of coal which the latter was required to furnish under the terms of the lease and contract. The advances requested would

vary in amount from time to time and were generally required, according to Mr. Devlin's representations, to enable the Mount Carmel Coal Company to meet its pay-rolls and pay its employees, thus preventing a shut-down of its mines. (Rec., 73 and 74.)

Relying upon the obligation of the Mount Carmel Coal Company under its lease and contract to furnish the Railway Company with the coal needed at the prices stated therein and instead of waiting until the 15th day of the month following the month in which coal would be furnished, the Railway Company on these various occasions anticipated the time of making its payments as required, by advancing moneys at the request of the Mount Carmel Coal Company. Such advancements were, of course, made in anticipation of the furnishing of coal which the Mount Carmel Company was required to supply under the written lease and agreement. Such advances would be subsequently adjusted by the parties when bills or invoices for coal would be furnished by the Mount Carmel Coal Company and the Railway Company would pass its vouchers therefor. (Rec., 74.)

The practice in force was for the Mount Carmel Coal Company to send to the General Purchasing Agent of the Railway Company invoices of coal furnished from the mines under the agreement during the current month, and the purchasing agent would make out a voucher of the Railway Company in favor of the Mount Carmel Coal Company for coal specified in these invoices. This voucher would be deliverable to the Mount Carmel Coal Company on the 15th day of the following month and would be presented by the

Mount Carmel Coal Company to the treasurer of the Railway Company for payment. It would then be paid or adjusted by the treasurer of the Railway Company when presented, but, of course, out of any such voucher or subsequent vouchers for coal furnished under the written lease and agreement there would be deducted by the treasurer of the Railway Company any sums which it had advanced, with interest on such advancement up to the day of settlement. If there was any balance left it would be paid over in cash to the Mount Carmel Coal Company; but if the Railway Company had advanced more money than would be covered by its voucher payable on the 15th day of the subsequent month, the difference or balance would be carried over to be charged against the invoices or vouchers for coal subsequently furnished and which the Mount Carmel Coal Company was obligated to furnish under the terms of the lease and agreement. (Rec., 77.)

On some occasions the Mount Carmel Coal Company would give an order in favor of some bank upon the Treasurer of the Railway Company to pay a note of the Mount Carmel Coal Company when due out of the specified voucher for coal which might become payable in the future as anticipated to the Mount Carmel Coal Company under the terms of the agreement. Such order would be filed by the Railway Company and at the request of the Mount Carmel Coal Company the note might be taken up by the Railway Company in order to enable the Mount Carmel Coal Company to secure from such bank other sums to meet its pay rolls, but such payments were made by the Railway Company for the Mount Carmel Coal Company with

the distinct understanding that they were to be regarded as advances in payment for coal which was to be furnished by the Mount Carmel Coal Company under the terms of the lease and contract. They were to be adjusted by the vouchers, or rather in settlement of the vouchers for coal so furnished. (Rec., 85.) No money would be repaid by the Coal Company to the Railway Company. There would be simply an adjustment of accounts under the contract.

The officers of the Railway Company knew, of course, that they would be safe in making such advancements in anticipation of its obligation to pay for coal delivered because they knew that on presentation of subsequent invoices of the Mount Carmel Coal Company for coal furnished under the agreement they could and would deduct in settlement therefor and out of the vouchers which would be issued by the Railway Company, a sum equivalent to such advances; and, if the Mount Carmel Coal Company should insist upon being paid again for the coal which was furnished, and should refuse to deliver more coal until it were paid again for coal which had theretofore been delivered and paid for, it was in the power of the Railway Company under the terms of the written agreement to give thirty days' notice and thus terminate the entire lease and agreement, or the Railway Company might treat such positive refusal as a repudiation of the existing arrangement or contract and rescind the same. We will give some extracts from Mr. Wellman's testimony throwing some light upon transactions involved:

"A. It was the custom of Mr. Devlin to ask advances.

Mr. Smith: Never mind about the custom. State what was said at the different times.

A. He asked for advances for pay roll purposes.

Q. Well, were those advances made from time to time by Mr. Wilder as Treasurer in response to his request?

A. They were in response to his request.

Q. How did he agree to satisfy those advances?

A. With voucher for coal.

Q. What do you mean by vouchers for coal?

A. His voucher represents the amount of coal furnished the Company from month to month." (Rec., 74.)

* * * * *

A. May 23, 1905, advance with interest was made on account of July voucher, which advance was made to aid in meeting pay rolls, the pay days being the second and fourth Saturdays each month, the second pay day of May would fall on May 27th. This advance was made May 23rd.

* * * * *

Q. Take the next item?

A. On July 3rd, the next item is $33,247.50, on July 3rd, advance with interest was made on account of July voucher, which advance was to assist in meeting pay rolls due July 24th. This payment was promised by E. Wilder, Treasurer, prior to the collapse of C. J. Devlin's affairs, and was to arrange with the American National Bank at Kansas City for pay roll purposes. (Rec., 75 and 76.)

* * * * *

Q. How do these credits come?

A. From his vouchers for coal.

* * * * *

Q. Who did Mr. Devlin apply to when he wanted these advances made, what officer of The Atchison, Topeka and Santa Fe Railway Company?

A. He applied to the Treasurer, Mr. Wilder. In his absence he applied to me. (Rec., 76.)

* * * * *

Q. Say during the time mentioned, during the year 1905, was the Mount Carmel Coal Company furnishing coal monthly to The Atchison, Topeka and Santa Fe Railway Company under these contracts stated in this petition?

A. They were, yes, sir.

* * * * *

Q. You have mentioned vouchers here. Explain how they were made?

A. The invoices for coal were sent to the Purchasing Agent for the current month.

Q. That is the Mount Carmel Coal Company would send them to the Purchasing Agent?

A. The Mount Carmel Coal Company would send them to the Purchasing Agent for voucher.

Q. These invoices show how much coal was delivered to The Atchison, Topeka and Santa Fe Railway Company?

A. For the current month. The Purchasing Agent would voucher covering invoices in his hands. By agreement the settlement was on the 15th day of the succeeding month. If there was any balance due Mr. Devlin we paid him. If there was any balance due us we charged it up against his next month's voucher for coal."

The Receivers then admitted that they were constantly selling the Santa Fe's coal in large amounts ever since they were qualified anywhere from $50,000.00 to $75,000.00 a month. (Rec., 77.)

On cross-examination he testified:

"Q. You had to buy coal of him right along—he was selling coal to you right straight along, and his coal bills amounted to more than his aggregated pay roll, didn't it?

A. No, sir.

Q. You mean to say he was just barely getting

enough out of his Mount Carmel Mine to meet his pay roll?

A. I mean to say that during the month of April there was a balance of $24,000.00.

Q. For all the coal now that he had sold you, you had paid him and had overpaid him about $24,000.00?

A. No, sir; he owed us.

Q. Certainly, you had overpaid him, he was owing coal he had not delivered you, $24,000.00?

A. Yes, sir. (Rec., 80.)

* * * * *

Q. Do you recall any other conversation that you had with Mr. Devlin with reference to this particular subject, now, or have you testified to the sum and substance of your recollection?

A. It was agreed that we should charge this up to the account." (Rec., 81.)

An account or statement of advances was attached to the intervening petition which was sworn to by Mr. Wilder. The first item stated in the account of $14,063.16 was the balance of an advancement of some $24,000.00 made in April, 1905, under the foregoing general arrangement and expected to be adjusted by the amount which would otherwise become payable May 15, 1905, but which subsequently proved insufficient. (Rec., 75.) Mr. Devlin also gave two drafts of $24,000.00 as a sort of security, which, however, were taken by the Treasurer of the Railway Company under protest and with the understanding that if not paid the adjustment would still be made out of or by the coal vouchers. One of these drafts for $10,000.00 was paid; the other remained unpaid, but it was plainly understood that the taking of these drafts would not be regarded as payment of advances or as changing the understanding that in any event the advances should

be liquidated or settled in the account for coal to be subsequently furnished under the contract. There was, therefore, left remaining prepaid on the contract on account of this advance, $14,063.16. (Rec., 79 and 80.)

The next advance set up in the account was made on May 23, 1905, amounting to $20,000.00, with interest amounting to $20,280.00, and was made on account or in anticipation of the usual vouchers for coal to be furnished by the Mount Carmel Coal Company in that month or following. This advancement was also made to aid the Mount Carmel Coal Company in meeting its pay rolls. (Rec., 75.)

The last advance, with interest amounting to $33,247.50 was made July 3, 1905, on account of or in anticipation of coal to be furnished under the contract by the Mount Carmel Coal Company in July or August and was also made to aid the Mount Carmel Coal Company in meeting its pay rolls. (Rec., 75.)

In this particular instance Mr. Devlin arranged for his pay roll purposes through the American National Bank of Kansas City and gave an order upon the Railway Company against his coal vouchers which was brought to the Treasurer of the Railway Company and filed. The Railway Company agreed to take up this note for the Mount Carmel Coal Company in order that it might arrange with the bank for further funds. This note was taken up by the Railway Company at the request of the Mount Carmel Coal Company and was held by it for surrender. (Rec., 76.)

It is true the Railway Company added interest upon these advancements from the date the same were made

until they were finally adjusted in the settlement of its vouchers for coal furnished under the agreement. Attempt was made in questions propounded to Mr. Wellman on cross-examination to show that the advances were intended merely as loans because the Railway Company charged up interest. The truth is that, in making these advances, it was merely discounting its obligation to make payments under the contract by anticipating its obligation which was to pay after the coal was furnished in any given month. It had the right to discount its obligation by charging something in the nature of interest. There was no agreement that the sums advanced should be repaid in kind but simply that the amount of such advances should be deducted from any sums which should thereafter become due from and payable by the Railway Company for coal which was furnished under the contract. The idea of a loan was not admitted by the witness and, of course, it does not express the true nature of the transaction.

Since the Mount Carmel Coal Company requested and assented thereto, it is obvious that the understanding under which these advancements were made and there was an allowance in the way of interest, was because such payments were made before the Railway Company was obligated to make the same under the strict terms of the agreement. To the extent that such advancements were made, the mode of performance of the obligation of the Railway Company was varied or modified from the strict letter of the written agreement, and to that extent but only of course in respect to such transactions actually had can it be said that

some provision of the written agreement had been modified. Of course, it was not claimed that the provision of the written contract in regard to time and manner of payment to be made by the Railway Company for coal to be furnished under the agreement was entirely modified for the balance of the term of the agreement; but it was simply contended that in reference to the particular advances or prepayments made, the provisions of the written contract by mutual consent of the parties interested were varied or departed from.

It will be observed that by the terms of the original lease and agreement (Rec., 22) the Railway Company was to make its payment "on or before the 15th day" of each succeeding month in which coal would be furnished. Of course it could not be compelled to make payment before the end of any such month, but the parties interested in this stipulation in the agreement had the right to vary it from time to time if they chose to do so. If, therefore, the Railway Company had until the 15th day of the following month to satisfy its obligation to pay, sound business reasoning would prevent it from paying the same before due without some consideration therefor, and that consideration was an allowance in the nature of "interest."

It is, therefore, apparent that at the date of the bankruptcy of the Mount Carmel Coal Company on July 7, 1905, the Railway Company had at the request of the Mount Carmel Coal Company anticipated payments which it would be obliged to make if the contract was to be further carried out to the extent of something over $57,000. *The Mount Carmel Coal Company un-*

*der the contract was, of course, still obligated to deliver all the coal required by the Railway Company at the prices stated in the agreement.* The performance of the Railway Company in respect to payments covered by these advances having, therefore, been somewhat varied by the parties thereto from that contemplated in the written contract, the Mount Carmel Coal Company could not again have demanded payment for any coal so prepaid which should be furnished under the contract because of its obligations thereunder. This was the status and situation of the lease and agreement at the time bankruptcy proceedings were instituted against the Mount Carmel Coal Company and when receivers in bankruptcy were appointed July 7, 1905.

The receivers in bankruptcy took charge of the mines of the Mount Carmel Coal Company, proceeded to operate under the lease and agreement, and continued to furnish the Railway Company with coal at the prices therein stated. They were very soon informed of the claim and contention of the Railway Company. Indeed it was their duty to ascertain the condition of the contract and the status of the accounts between the parties thereto. It is true that Mr. Leland testified in very general terms and in rather a misleading way, evidently referring to some suppositious independent and disconnected oral agreement, that he did not know of any verbal contract between the Railway Company and the Mount Carmel Coal Company by which the written contract had been modified, but he admitted also that he had not read even the written contract. He admitted that the mines of the Mount Carmel Coal Company operated under the lease were

a valuable asset of the estate. He was the only one of the receivers who took actual charge and supervision of the affairs of the Mount Carmel Coal Company. Shortly after he took possession he admits that the Railway Company made known to him its claim that it had made these advances in question and that it was entitled to be furnished with coal under the contract without being required to pay again for the same. This appears from the following extract from his testimony (Rec., 89):

"Q. Then of course you never undertook to assume any verbal contract and to turn over any coal pursuant to any verbal contract Mr. Devlin may have made with the Santa Fe?

A. No, I never knew of that. I might mention this: It may have been some time in *August*, some time quite awhile after we had charge, when we wished the Santa Fe to advance so much money on account of paying our payrolls in different mines in Kansas, was the first I knew there was any hitch anywhere. Mr. Hurley was away and Mr. Wilder had instructions from Chicago that they *could not advance money unless the back was paid for, some former advances made.* I went up to Mr. Wilder's office to wire Mr. Hurley, next day was pay day. They said he had just got back. Mr. Copeland and I explained it to Mr. Hurley and Mr. Hurley said 'we must pay tomorrow.' That money was sent, was deposited by the Santa Fe to the National Bank, Pittsburg, Kansas, subject to the order of our manager, to pay the miners next day. Always afterwards, I receipted for this money, *sort of a receipt whereby they did not waive any rights.* I did that thinking it did not make any difference as receivers, as far as I was concerned.

Q. You had never, or the receivers or trustees have never undertaken to carry out this alleged

verbal agreement Mr. Devlin is supposed to have made prior to the receivership?

A. I never knew anything about it.

Q. Since the claim you never undertook to carry it out?

A. I never knew anything about it. *I understand they claimed they advanced money for the coal, and they had a right to the payment.*"

As to the testimony of Mr. Reeves, co-receiver, it is simply necessary to say that he paid no attention to the receivership of the Mount Carmel Coal Company. He did not even know that the properties were being operated in pursuance of a written lease and agreement—notwithstanding the report signed by him. He did understand, however, that the Railway Company was claiming that it had made advances and that it was insisting that these advances should be recognized if the receivers continued to furnish coal. (Rec., 90 and 91.) In any event it is manifest from the schedule filed by the receivers that they knew that the rights of the Mount Carmel Coal Company, bankrupt, were only such as existed undert the lease and contract. On Rec., p. 11, is found the following statement in their report:

> "This company" (referring to the Mount Carmel Coal Company) "owns no real estate or coal deposits, but is simply an operating company, which has for eight years past *worked under contracts and leases with the Atchison, Topeka and Santa Fe Railway Company, and said Railway Company's affiliated Coal Companies,—the Cherokee & Pittsburg Coal and Mining Company and the Osage Carbon Company. Operations are still carried on under the agreements referred to in extracting coal from lands owned by the last named coal companies,* and from coal deposits owned jointly by the said Cherokee Company and Craw-

ford County Coal Company. Coal is also being mined through shaft No. 9 from lands owned by the Devlin-Miller Coal Company.

Said agreements permitted the Mount Carmel Coal Company to use the mining facilities and equipment owned by the Cherokee and Osage companies in connection with the then existing shafts, likewise the use in new shafts of parts removed from shafts dismantled; and provided that all new shafts in other respects should be opened and equipped at the expense of the Mount Carmel Coal Company."

As the receivers refused to recognize or admit the claim of the Railway Company arising out of these advancements and its right to have the coal furnished according to the terms of the written contract without being again required to pay for so much as had been paid for by these advances, and after repeated and fruitless efforts to secure an adjustment without litigation, the Railway Company thereupon in connection with the Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company gave notice on November 1, 1905, that they would ask leave to file and in the same month did file their intervening petition, which, although hastily prepared, very plainly set up the claim of the Railway Company in respect to the advancements which it had made, attaching copies of the written agreements referred to, and that such advancements were in a sense a modification of the written lease or agreemnt to the extent that the same had been made and that by reason of such advances and the understanding in respect thereto, it was entitled to have delivered to it coal under the terms of the contract to the extent of such advancements without being required to pay again for the same. It asked

the court sitting as a court of equity to direct the receivers either to allow the claim of the Railway Company in the adjustment of accounts for coal furnished or to surrender up the leased premises and the agreement. (Rec., 33 to 70.) In other words, it was an application that the receivers in bankruptcy and the Bankruptcy Court elect whether to continue the assumption of the lease and agreement subject to the modification or variation ingrafted thereon by the oral arrangement resulting in the advancements in question, or, if they did not elect to assume the agreement in the condition it was in the hands of the bankrupt, then the same and the leased premises should be surrendered up to the Railway Company upon it or its affiliated companies making settlement for improvements made by the Mount Carmel Coal Company as provided in the written agreement.

*If the receivers were not prior to this time fully advised as to the claim and contention of the Railway Company, not only they but also the Bankruptcy Court had full advice as to the nature of this claim upon the filing of the intervening petition and upon the hearing of testimony in respect to the same. Certainly it was obligatory upon the court at that stage of the case to direct the receivers or trustees to promptly make their election.*

Our position was virtually admitted in the brief filed in the Circuit Court of Appeals by Mr. Dean on behalf of the trustees in which he stated on pages 3 and 4 thereof as follows:

> "It should be remembered that while the various sums of money thus paid by the Railway Company to the Mount Carmel Coal Company prior to the

date fixed for the payment by the terms of the contract were called advances, and were technically advances, nevertheless, in almost all instances the coal for which the so-called advanced payments were made was delivered to the Railway Company at the time of such advancements, since the deliveries were being made every day by the Mount Carmel Coal Company to the Railway Company."

(The latter, of course, is a slight misstatement because it is plain that coal was not furnished sufficient to meet the advancements.)

"On July, 7, 1905, the Mount Carmel Coal Company was adjudicated a bankrupt, and the appellees were on that day appointed receivers to carry on the business of the company, and in the capacity of receivers and trustees of said bankrupt *continued the business until the expiration of the contracts of lease.* At the date of the adjudication in bankruptcy, it appears that the Railway Company had advanced to the bankrupt the sum of $57,304.16 in excess of the value of coal delivered to it up to that date. * * *

"The receivers continued to deliver to the Railway Company after their appointment, the same as had been done by the Mount Carmel Coal Company before its bankruptcy, at the same schedule of prices. When the Railway Company were asked to settle with the receivers for coal delivered to it by them, it withheld from the amount due to the receivers the amount which the Railway Company had advanced to the Mount Carmel Coal Company previous to its bankruptcy, and this controversy arises out of that fact.

"It might be stated as a fair inference from the evidence in this case that when the Mount Carmel Coal Company secured advances from the Railway Company it promised that the amount of money so advanced might be deducted by the Railway Company from the amount of bills to be rendered by the Mount Carmel Coal Company against

> the Railway Company for coal already sold and delivered to it, or to be sold and delivered to it in the future."

It is evident from the opinion of the referee who heard the testimony and of the district judge reviewing such opinion that they each entirely misconceived the nature of the claim of the Railway Company. They each treated the oral arrangements covering the advances in question as entirely separate, distinct and independent of the written contract and in no sense in any manner varying or affecting the same. The referee stated in his opinion that he was unable to find testimony to modify the written lease, that there was no *express* oral agreement to that effect. He did state, however, that it was true that the advances were to be paid by moneys due the Coal Company for coal furnished the Atchison Company and that the money instead of being paid under the terms of written contract would be kept to reimburse the Railway Company for money advanced. (Rec., 31.) (There was of course no understanding that any money advanced should be repaid.) But he continued:

> *"But this amounts to the same thing as saying that the the Santa Fe Company merely paid for its coal in advance although not required to do so by the terms of the contract."* (Rec., 31.)

That is just what we are contending. On page 25 the referee also stated after referring to the written lease and agreement:

> "The testimony also shows that these advances made by the Santa Fe Company to enable the Mount Carmel Coal Company to meet its payrolls were to be paid by the delivery of coal *under the terms of the lease above referred to."*

The District Judge in his opinion treated the arrangement in respect to these advances in the same manner but as of no more legal significance or effect than had a bank or some stranger to the lease and agreement furnished the money and taken the obligation of the bankrupt to repay within a certain time with interest. (Rec., 109.)

The referee erred in concluding that there was no express modification or variation of the written lease and agreement merely because the parties had not in set terms or formal language expressed an intention to effectuate such a result.

The referee and the district judge in treating the various verbal transactions or arrangements covering the advances in question as being entirely separate and independent and in nowise connected with the written lease and agreement overlooked and ignored an obvious fact which would be apparent to anyone who would place himself in the position of the contracting parties.

*The important fact is that there was then in effect a contract by which the Mount Carmel Coal Company was obliged under its terms to furnish the Railway Company with all coal required by it for its daily uses at prices stated or determined; that the Railway Company, in view of those existing obligations and instead of waiting to make its payments or perform its part of the contract upon the* 15*th day following each month, at the express request in each instance of the Mount Carmel Coal Company made, as found by the referee, its payments by furnishing its money in advance and thereby performed its part of the undertaking in the*

*particular instances specified at a date prior to the time it was legally required so to do.*

The agreement was not that the Mount Carmel Coal Company should furnish any other or different coal than that it was obligated to furnish under the written lease and agreement. The prices paid for such coal remained unaffected. The only variation from the strict and literal terms of the contract was that the Railway Company at the special instance and request of the other contracting party prepaid for certain amounts of coal which such other party would have to furnish under the written agreement. *It was not necessary for the Railway Company to exact from the Mount Carmel Coal Company an independent or collateral undertaking that it would furnish coal to such extent because it was already obligated under its contract to do that and more.* The understanding was that the advancements should be adjusted at the end of each month in the accounts between the parties after the coal was furnished in accordance with the agreement. It is, therefore, obvious that the strict manner of performance by the respective parties in respect to pay to be made by the Railway Company and received by the Mount Carmel Company as specified in the written contract was varied or modified to the extent that such advancements had been made. To the extent, therefore, and in the particulars that the Railway Company at the request of the Mount Carmel Coal Company had performed in advance of the time it was required to under the strict terms of the agreement, to that extent only and in those particulars, by the agreement of the parties to the contract, the written agreement may be said to have been varied or modified.

The Circuit Court of Appeals speaking of these verbal arrangements and their connection with the written agreement said on page 125:

> "It was not, in our opinion, a modification of any of the *substantive* provisions of the contract, but was a change rendered necessary by subsequent events *in the method of its execution only.* It was an arrangement in no manner inconsistent with any of the provisions of the original contract, but only in aid of its execution. The contract after the new arrangement remained as before. The Coal Company still had a right to mine coal on the same terms and conditions as before and was bound to supply the daily needs of the Railway Company as before. The money paid in advance entitled the Railway Company to an amount of coal which the money so advanced would pay for according to the terms of the original contract."

Some reference is made on page 43 of opponent's brief to a provision in the contract requiring the Mount Carmel Coal Company to give a bond of $100,000 for its faithful performance of its covenants as showing the improbability of the oral arrangement—however that may appear. There is nothing to show that any such bond was in effect at the time, but if there was, we believe anyone would know that it would not cover a case where the strict letter of the written contract had been varied or the mode of performance modified. However, there can be no dispute as to the facts. There was no conflict in the evidence.

Again, it is stated, as a matter of prejudice to the Railway Company's contention, that both Mr. Devlin and Mr. Wilder had died before the hearing. However, Mr. Wellman, the assistant treasurer of the Railway Company, was thoroughly cognizant of the

transactions and the nature and purpose of the same. Moreover, it appears from the record that the intervening petition was sworn to by Mr. Wilder, that the receivers first filed a demurrer to the same, but upon his death they withdrew this demurrer and filed an answer in general terms denying the allegations of the intervening petition. Had they acted in good faith they would have expedited the hearing as they could have done and we might then have had Mr. Wilder's testimony in the record in addition to that of Mr. Wellman. The fault of such omission is their own.

Before this cause could be reached for argument in the Circuit Court of Appeals which was in December, 1906, it became apparent that the term of the lease and agreement had expired, namely, on June 1, 1906, and, therefore, as under the changed circumstances that court could not grant the alternative relief of requiring a surrender up of the lease and contract by the trustees, there was nothing for it to consider except the right or claim of the Railway Company to be allowed for these advancements out of the bankrupt estate inasmuch as it was admitted in the argument and in the brief filed on behalf of the trustees that they had continued to operate under the lease and agreement and had received all the benefits thereunder up to the date of such expiration. As stated in their brief filed in that court: "in the capacity of receivers and trustees of said bankrupt (they) continued the business until the expiration of the contracts of lease."

It is now charged that the Railway Company was derelict in not having the cause advanced and determined in the Circuit Court of Appeals before the ex-

piration of the lease and agreement. It is apparent that we could not have had it expedited in time to accomplish such a result. There was no ground upon which we could move that this cause should be heard over other litigation as important. The trustees in bankruptcy, however, were in position to have had the cause advanced had they desired to do so. They might have claimed that an early decision was necessary to enable them to close up the bankrupt estate. Being, however, in possession under the lease and agreement and enjoying all of its benefits, they preferred in a high-handed and arbitrary manner to continue therein under the protection of the bankruptcy court, to the detriment of the rights of the Railway Company. We respectfully submit that our rights could not be prejudiced by the error and wrongful act of the bankruptcy court and its trustees in refusing to make an election in due time when requested or to deal equitably and fairly with the Railway Company. The result of all is that the action of the trustees and of the bankruptcy court was to assume for the benefit of general creditors and of the bankrupt estate an executory contract, and at the same time attempt to thrust and impose upon the Railway Company, the other party thereto, an entirely different arrangement or agreement than that which existed between the parties thereto at the date of the bankruptcy. In other words, the District Court evidently held that general creditors of a bankrupt obtained greater rights under executory contracts of such bankrupt than the bankrupt himself might have asserted.

## ARGUMENT.

### (A) ON THE MOTION TO DISMISS.

It is contended that the appeal to this court was had under the Act of March 3, 1891, although the appeal was taken within thirty days under the rule of this court and apparently under the Bankrupt Act. Of course, no appeal would lie to this court from a judgment or decree allowing a claim as preferential or as a lien upon property which was being administered in the Bankruptcy Court in a bankruptcy proceeding. The jurisdiction of this court was plainly limited in Section 25b of the Bankruptcy Act as follows:

> "From any final decision of a Court of Appeals allowing or rejecting a claim under this Act an appeal may be had under such rules, within such time as may be prescribed by the Supreme Court of the United States in *the following cases and no other*," etc.

The appeal in question is from a *final decision* of the Circuit Court of Appeals *allowing a claim* of the Railway Company under the Bankruptcy Act, for it was not allowed under any other act. It was at all times claimed by the Railway Company that the advancements made by it to the bankrupt prior to the bankruptcy, were charges in favor of the Railway Company upon the lease and agreement which had been seized and was being administered by the receivers in bankruptcy as property of the bankrupt, and that such claim should be allowed by the receivers as a burden or charge upon the agreement or such agreement

should be surrendered up by them. When the case was reached for hearing in the Circuit Court of Appeals we insisted in the brief and argument that, as the alternative relief could not be granted (the contract having expired as was apparent from the record), that there was nothing left for the Circuit Court of Appeals to decide and determine but the right of the Railway Company to have its advances allowed as a charge against the trustees in bankruptcy and a charge upon the bankrupt estate, a great part of which consisted of profits and property derived under the lease and agreement. The fact that the trustees and the bankrupt estate had had the full benefit of the lease and agreement up to the date of expiration was admitted and there was nothing left for the Circuit Court of Appeals to do, as we shall show hereafter in the argument on the merits, but to allow the claim of the Railway Company as it did. It was allowed as a claim entitled to be paid out of the bankrupt estate before the claims of general creditors. It was allowed because it was an equitable charge upon the contract which was seized by the receivers in bankruptcy as property of the bankrupt.

The case is similar to that disposed of in the memorandum decision of this court in *Savings Deposit Bank & Trust Company of Elyria, Ohio, Appellant*, v. *Nathan Loeser, Trustee of the Estate of Cassie L. Chadwick, Bankrupt*, 209 U. S., 542, in which there was an appeal from a decision of the Circuit Court of Appeals, Sixth Circuit, reversing a decree of a Bankruptcy Court allowing a chattel mortgage as a lien upon certain property of the bankrupt. The appeal to this

court was dismissed for want of jurisdiction, citing *Chapman* v. *Bowen*, 207 U. S., 89; *Bank* v. *Klug*, 186 U. S., 202, and General Order XXXVI. As to the nature of the appeal in that case see *Loeser* v. *Savings Deposit Bank & Trust Co.*, 163 Fed., 212.

As the purpose of the bankrupt law was to expedite the settlement of bankrupt estates and, therefore, appeals in respect to claims upon the property of the bankrupt so that such estates might be settled expeditiously, it cannot be assumed that it was intended by any provision of the bankrupt law that the slow method of appeals provided for in the Act of 1891 should govern, particularly in respect to cases specially provided for in the Bankrupt Act for appeals to this court.

In addition to authorities heretofore cited upon this motion we call attention to *Kizer* v. *Texarkana & Ft. Smith Railway Company*, 179 U. S., 199, showing there was no Federal question set up in this case by the trustees within the requirement of Subdivision 1, Section 25b of the Bankrupt Act. See also *Hulbert* v. *Chicago*, 202 U. S., 275, 280.

It is strenuously urged and reiterated a dozen or more times in opponent's brief, apparently for the purpose of creating some prejudice, that in the opinion of the district judge in disposing of the case before him it is expressly stated by him (Rec., 107): "any and all right of petitioners to preferential payment of the money so advanced out of the bankrupt estate is as expressly and positively disclaimed," and it is solemnly asserted that we took no exceptions and made no assignment of error in respect to such statement. We

respectfully suggest that we have not been advised of any statute or practice which makes the *opinion*, whether written or oral, of a bankruptcy judge in disposing of a matter before him, a part of the record. The opinion of a court in disposing of a case does not become a part of the record in the case. We understand, and our learned opponents understand, that an exception taken to any statement merely found in the opinion of a court would have no legal effect and that no error could be predicated thereon and, therefore, a lawyer familiar with the practice would not think of assigning error thereon. We believe our opponents know better and we need but call attention to the ruling of this court in *Chapman* v. *Bowen*, *supra*, that such opinion is not a part of the record. The district judge obviously did not understand our position or contention. It is true that our claim then was not, that the advances made by the Railway Company were absolutely entitled to be paid as a preference out of the general estate of the bankrupt until and unless there was an assumption of the lease; but that if the trustees elected to assume the lease and agreement they were bound to recognize and satisfy this claim as a charge thereon or a variation thereof and that they should do one or the other thing, and, of course, if they continued to enjoy the benefits of the contract they were bound to discharge the burdens thereon and allow the claim.

The referee in his report (Rec., 31 and 32) stated:

> "Although there are equities in favor of petitioner's claim by reason of having advanced money to meet payrolls and keep the Mount Carmel Coal Company a going concern, I can find nothing in

the law which will justify the court in giving the claim priority over those of other creditors."

This shows that the referee understood there was some such claim made by the Railway Company .

The case of *Hewit* v. *Berlin Machine Works*, 194 U. S., 296, cited by our opponents, is hardly in point, as in the intervening petition filed in the bankruptcy proceedings there the owner of certain machines demanded possession thereof as such owner under a title adverse to the bankrupt estate. No motion was made to dismiss the appeal, nor does the jurisdiction of this court appear to have been challenged. The appeal in the present case is rather analogous to that had in the case of *Savings Deposit Bank & Trust Company of Elyria, Ohio*, v. *Loeser, supra.*

Had the Circuit Court of Appeals been requested to make its findings of fact it would have stated no doubt the admissions made in the arguments and briefs before it showing that its judgment or decree was in all respects warranted. There is no reason why these findings could not have been requested by the attorney for the trustees in this as in any other case affecting a decision concerning the allowance of a claim as preferential or otherwise in bankruptcy proceedings. He knew there was then only one question remaining to be decided in the case, that is whether the claim became preferential or a charge. As the judgment of the Court of Appeals would not become final until the end of the term he could, if surprised, have had any formal entry thereof set aside, in order that findings might be made, had he requested the same. No such suggestion was ever made to that court.

## (B) ON THE MERITS.

### I.

BY ADVANCING OR PREPAYING AT THE REQUEST OF THE MOUNT CARMEL COAL COMPANY FOR COAL WHICH THAT COMPANY WAS OBLIGED TO FURNISH UNDER THE WRITTEN LEASE AND AGREEMENT THAT COMPANY AND THE RAILWAY COMPANY TO THAT EXTENT AND IN THAT PARTICULAR VARIED OR MODIFIED THE MODE OF PERFORMANCE REQUIRED OF THE RAILWAY COMPANY BY THE WRITTEN CONTRACT AND MODIFIED OR VARIED ITS TERMS SO FAR AS APPLICABLE TO COAL SO PAID IN ADVANCE. THAT, AS CONTRACTING PARTIES, THEY HAD THE LAWFUL RIGHT TO DO AND STRANGERS TO THE CONTRACT ARE IN NO POSITION TO QUESTION WHAT WAS DONE.

The referee seemed to think that there was no "*express*" agreement to modify the written lease and agreement, and the District Court seemed to think there could be no modification of the terms of a contract operative only for or during a limited period or in respect to certain matters arising thereunder unless the modification and variation entirely changed some express stipulation and was effective for the balance of the term of the agreement.

Both views are incorrect. Parties to a stipulation in a contract have the same power to modify the same, change the mode of performance, waive conditions or prescribe others in their places as they have to make an original agreement. General creditors of either are not parties to the executory contracts of their debtors and have no right to question any change or alteration in the same or any *settlements* made thereunder.

Parties to an agreement may entirely abrogate the existing arrangements and general creditors could not claim to be prejudiced thereby as they have no interest or voice in the execution of such contracts. The modification or variation agreed upon may only extend to a limited performance of or to certain special matters arising in the performance of the agreement and in such respects only modify or vary such agreement. It need not be expressed in any set phraseology or according to any formula. A modification or a variation like an original undertaking may be proved by the acts and dealings of the parties. Juries are constantly called upon to determine what are the terms of oral arrangements from evidence of what the parties in fact have done, as well as of what was said by them.

In this commercial age where freedom to contract has been fully recognized, the courts have endeavored by all reasonable means to ascertain the intent of the parties, and when such intent has been ascertained, it is the duty of the court to enforce it if not unlawful.

In referring to what are known as implied contracts, as contradistinguished from constructive contracts, and the terms of which are shown by the acts and dealings of parties, it is said in I Parsons on Contracts, 9th Ed., star pages 4 and 5:

> "These contracts form the warp and woof of actual life. If they were wholly disregarded, the movement of society would be arrested; and in so far as they are disregarded that movement is impeded or disordered."

Even in formal written contracts parties seldom fully express all the terms thereof, and courts are

called upon frequently to supply some undertaking which it is apparent the parties intended from the agreement itself and the situation in which the contracting parties were at the time.

In *Youngberg* v. *Lamberton*, 91 Minn., 100, (97 N. W., 571), the Supreme Court of Minnesota said, on page 572:

> "Neither can it be doubted that it was competent for the parties to the written agreement to change or modify the same, and by new conditions, not in writing, waive, dissolve, or annul the original contract, or to add to or qualify its terms, so as to be valid and binding upon the parties. *Goss* v. *Nugent*, 5 B. & A., 64; *Delaney* v. *Linder*, 22 Neb., 274, 34 N. W., 630; *Lynch* v. *Henry*, 75 Wis., 631, 44 N. W., 837; *McCreery* v. *Day*, 119 N. Y., 1, 23 N. E., 198, 6 L. R. A., 503, 16 Am. St. Rep., 793. * * *
>
> "This testimony tended to show that reciprocal rights were granted and concessions made by each of the parties in the modification of the original agreement, and were acquiesced in by each; hence upon the verdict of the jury the new contract though resting partly upon the original stipulations and partly upon parol changes, must be regarded as their final determinative convention concerning all matters between the parties. *Siebert* v. *Leonard*, 17 Minn., 436 (Gil. 410); *McClay* v. *Gluck*, 41 Minn., 193, 42 N. W., 875; *King* v. *Duluth Ry. Co.*, 61 Minn., 482, 63 N. W., 1105."

So, in *Teal* v. *Bilby*, 123 U. S., 578, it is said:

> "It is hardly pretended by counsel for plaintiffs that it was not competent, after the written contract was made and signed by the parties, for them to make another verbal contract *in regard to some parts of it, which to that extent should be a substitute for the first one.*"

In *Bryant, Admr.* v. *Stephens et al.*, 58 Ala., 636, a party gave his promissory note for the excess on an exchange of lands, and subsequently gave two notes with the recital on each that "the consideration for which this note is given is the following described lands lying in Coffee County," the land being the same as that upon which the original note was given. Held, that the contract evidenced by the original note was altered by the giving of the subsequent notes.

In *Holman & Woods* v. *The Georgia R. R.*, 67 Ga., 595, where by the terms of a written contract wheat was made deliverable by one of the parties only to the order of the other, endorsed on the elevator receipt given for it, yet it was still held that with the consent of both parties this could be changed by subsequent agreement, and the wheat delivered without such endorsement.

In *Cline* v. *Shell*, 43 Oregon, 372 (73 Pac., 12), it was held that a provision in a building contract requiring the contractor to furnish hardware was modified by the owners purchasing it in the presence and with the consent of the contractor, and requesting the seller to charge it to him.

In *Hull* v. *Pitrat*, 45 Fed., 94, a written contract between parties was held subsequently modified by their acts and dealings. On page 103 the language of Judge Swayne, in *Railroad Co.* v. *Trimble*, 10 Wall., 376, 383, is quoted with approval:

> "The most solemn contracts under seal, where the statute of frauds is not involved, may be changed or abrogated by a new parol agreement, express or implied; and a contract within the statute may be taken out of it by the conduct of the parties."

In *Phoenix Mutual Life Ins. Co.* v. *Hinesley,* 75 Indiana, 1, it was held that a provision in an insurance policy requiring payment of an annual premium on or before a given day in each year might be shown to be modified or changed by the conduct and dealings of the parties thereto, and that such annual premium should not become payable until the appellant had given the appellee notice thereof, and of the amount of payment, after deducting the annual dividend.

In *Prudential Ins. Co.* v. *Sullivan,* 27 Ind. App., 30, (59 N. E., 873), in a suit on a policy of insurance an oral agreement between insurer and insured was admitted showing that the payment of the premium which was to be in advance was waived by the insurer and it was held that such waiver might be shown by parol.

See, also,

II Page on Contracts, 608.

1 Greenleaf on Evidence (16th Ed.), Sec. 304.

It is evident from the testimony that the transactions between the Railway Company and the Mount Carmel Coal Company were understood and intended by the parties as a variation or modification in the mode of performance of the written stipulations in the agreement to the extent that the advances were made by the Railway Company. *The Railway Company was not making such advances to the Mount Carmel Company on the general credit of that company, but in view of and upon the strength of the contract obligation of the Mount Carmel Company to furnish the Railway Company with coal at the prices stated in the written agreement.*

Instead of paying, after a certain amount of coal had been delivered, upon the 15th day of each following month, the mode of performance in respect to the Railway Company, but in respect only to the particular advances, was by consent changed, and the Railway Company paid in advance for a certain amount. This arrangement was made in view of the contractual relations between the parties, as evidenced by the written contract, and it must be assumed that the advances were made on the faith of and in reliance upon the contract obligation of the Mount Carmel Company to furnish coal.

In *Carr* v. *Hamilton*, 129 U. S., 252, it was held that where a holder of a life policy borrows money of his insurer, it will be presumed *prima facie* that he does so on the faith of the insurance and in expectation of possibly meeting his obligation to the company by that of the company to him. In that case the Life Insurance Company became insolvent and went into liquidation. The amount due on an endowment policy payable in any event at a fixed time, and sooner if the party died before that time, it was held, should in settling the company's affairs be set off against the amount due on a mortgage deed from the holder of a policy to the company by way of compensation or reconvention.

On page 262 it is said:

> "We are inclined to the view that where a holder of a life policy borrows money of his insurer, it will be presumed, *prima facie*, that he does so on the faith of the insurance and in expectation of possibly meeting his own obligation to the company by that of the company to him, and that the case is one of mutual credit, and entitled

to the privilege of compensation or setoff whenever the mutual liquidation of the demands is judicially decreed on the insolvency of the company."

That the true intent of parties to any arrangement must be viewed from the standpoint of the parties themselves, the situation in which they were, the surrounding conditions and their respective existing obligations was applied by this court in *Fourth Street Bank* v. *Yardley*, 165 U. S., 634. On page 650 it was said:

> "In the light of these principles we proceed to consider the facts certified, in order to ascertain whether in the transaction connected with the giving of the check in question there was either an express agreement to assign the fund, or to give a lien or charge thereon, or whether, if not express, *such agreement is necessarily to be implied from the conduct of the parties, the nature of their dealings and the attendant circumstances.*"

On page 651 the court continued:

> "When we look at the situation of the parties and the character of the transaction disclosed by the facts just referred to, no difficulty is experienced in ascertaining the intent of the parties," etc.

Further on it is said:

> "The deduction arises that, as it cannot be reasonably conceived that the loan would have been made without the reference to and assignment of the particular fund from which alone the hope of immediate payment was to be reasonably expected, the parties must have and did intend to create a particular appropriation, charge or lien on the property upon the faith of which they both dealt."

That case is pertinent also upon the equities of the case at bar.

In *Jennings* v. *Bank of California*, 79 Cal., 323 (21 Pac., 852), it was held that a bank was entitled to an equitable lien against a certificate of stock for advances made to a holder thereof until it had notice of a transfer, and it was also held that a contract for an equitable lien was to be inferred or implied from the conduct and dealings of the parties.

The advancements made by the Railway Company were to be adjusted as had been done in the past, in accordance with the prices fixed in the written contract for the coal furnished thereunder, showing very plainly that the parties understood, that their dealings were had in view of the written contract obligations and as a change in the mode of performance to the extent that prepayments or advances were being made by the Railway Company for the coal which the Coal Company was obligated to furnish it under the terms of the lease and agreement which was afterwards assumed by the receivers and trustees in bankruptcy.

See *Stelling* v. *Jones Lumber Co.*, 116 Fed., 261, 266 and 267 (C. C. A., 7th Cir), where there was a contract for the manufacture and sale of lumber and the purchaser to enable the vendor to continue business furnished the latter large amounts of money, the court held such sums were advanced under the agreement and for the purchase price of lumber to be furnished.

## II.

IF THE ASSENT OF THE OSAGE CARBON COMPANY AND THE CHEROKEE AND PITTSBURG COAL & MINING COMPANY WAS NECESSARY TO SUCH VARIATION FROM OR MODIFICATION OF THE WRITTEN LEASE AND AGREEMENT THE SAME WAS GIVEN. HOWEVER SUCH ASSENT WAS NOT NECESSARY AS THE CHANGE ONLY AFFECTED A STIPULATION BETWEEN THE RAILWAY COMPANY AND THE MOUNT CARMEL COAL COMPANY.

It is dolefully contended that the modification or variation from the written contract by reason of the verbal arrangements in question was inoperative because the other parties to the lease and agreement, the Osage and Cherokee companies, had not assented to the same. (They are not complaining on account thereof.) No such contention was made at any time either before the Referee or the District Court. If such assent were necessary it is shown to have been given or the modification acquiesced in by the companies in question joining the Railway Company in the intervening petition asking relief on account thereof. No objection was ever made by these companies on account thereof. They were affiliated with the Railway Company. No express assent on their part was necessary. The stipulation in the written lease and agreement which was varied from was one only between the Railway Company and the Mount Carmel Company. It concerned them alone. It only affected the mode of performance on behalf of the Railway Company and was beneficial to the Mount Carmel Company as it was made at its request. Neither it nor its assignees

could now charge that the oral arrangement was inoperative to modify the relations and situation between the parties. The point made by our opponents is simply lugubrious.

## III.

THE VERBAL ARRANGEMENT WAS NOT WITHIN THE STATUTE OF FRAUDS AS ALLEGED IN THE AMENDED ANSWER OF THE TRUSTEES.

The trustees filed an amended answer to the intervening petition in which they set up: (1) a general denial of the averments in the petition; (2) a denial that the verbal contract set forth in the petition was a modification of the written lease or contracts but alleged that *if* made at all it was an entirely independent contract; and, (3) that the verbal contract as a modification of the written lease would be within the statute of Frauds of the State of Kansas and void. (Rec., 72.)

The second and third defenses it will be seen are purely argumentative and not good pleas.

However, the section of the Kansas Statute of Frauds and Perjuries which was called to the attention of the lower court, but without much insistence on behalf of the trustees, and which is now relied upon, is section 5, page 674, General Statutes of Kansas, 1901, by Dassler, reading as follows:

> "Sec. 5. No leases, estates or interests of, in or out of lands, exceeding one year in duration, shall at any time hereafter be *assigned or granted*, unless it be by deed or note in writing, *signed by the party so assigning or granting the same*, or

their agents thereunto lawfully authorized by writing, or by act and operation of law."

It is claimed that as the written agreement was for an interest in lands exceeding one year in duration it was required to be in writing and there could be no verbal modification of the same. In the first place it will be observed that the above section only provides that no lease, estate or interest in lands shall be "*assigned or granted*," except by deed or note, in writing, "*signed by the party granting the same*." Such a provision does not require, for instance that the undertaking of the lessee be in writing. Thus in *Santa Fe Railroad Company* v. *English*, 38 Kansas, 110, it was held that the consideration for lands sold and deeded might be shown to be an oral promise of the grantee not in writing, such as an agreement to give a life pass. The construction of that court is conclusive.

Neither does the statute in question require the incidental undertaking between the Railway Company and the Mount Carmel Company, the so-called lessee, in regard to furnishing and paying for coal, to be in writing; so that the arrangement whereby the Atchison Company made its advances was not one which fell within the above section, or which by the statutes of Kansas was required to be in writing.

In the next place, the arrangement in question referred only to the mode of performance under the agreement. At the request of the Mount Carmel Company the Atchison Company had performed, by making payments to the extent specified, at a date prior to the time it was obligated to do so under the written agreement, and the Mount Carmel Company received the full benefit of that performance.

It is not contrary to any provision of the Statute of Frauds of Kansas for parties, even to a written contract which that statute requires to be in writing, to dispense with or change the mode of performance thereunder by either party; and it would be a fraud to permit one of the parties who had received the benefit of the substituted or changed performance to set up the statute, or claim that the arrangement was invalid because not in writing, when the statute does not plainly so provide. It has been said in a number of instances that such statutes were not intended to assist in the perpetration of fraud.

The obligations of the Mount Carmel Company under the written contract were not at all changed by this arrangement. Such arrangement contemplated the continued existence of the written obligation of the Mount Carmel Company to furnish to the Railway Company coal required by it. The Railway Company satisfied its obligation to make certain payments under the written contract by making equivalent advances.

It is said in II Coke upon Littleton, Butler & Hargreaves Notes, Sec. 343, page 21b:

> "And so it is if the money is to be paid on such a day, yet if the money be tendered and received at any time before the day, it is sufficient."

In *Cummings & Others* v. *Arnold & Another*, 3 Metcalf Reports, 486, it was held that the terms of a written contract for the sale of goods may be varied by a subsequent parol contract, though the original contract falls within the operation of the Statute of Frauds. That was a suit for breach of a written contract to manufacture and deliver weekly to the plain-

tiff a certain quantity of cloth at a certain price per yard on eight month's credit. It was held that the defendant might give in evidence, as a good defense, a subsequent parol agreement between him and the plaintiff, made on a legal consideration, by which the terms of payment were varied, and that the plaintiff had refused to perform the parol agreement. On page 489 the court quotes with approval the following language of Lord Denman, in *Goss* v. *Lord Nugent*, 5 Barn. & Adolph, 65, as a well established principle:

> "After the agreement had been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left to the written agreement."

On page 491 the court continues:

> "The statute (referring to the Statute of Frauds) therefore requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate its performance. It does not say that such a contract shall not be varied by a subsequent oral agreement for a substituted performance. That is left to be decided by the rules and principles of law in relation to the admission of parol evidence to vary the terms of written contracts."

The case of *Cuff* v. *Penn.*, 1 M. & S., 21, is cited with approval.

In *Stearns* v. *Hall*, 9 Cush., 31, it was held that evidence was admissible to show that the time of per-

formance of a written contract within the Statute of Frauds had been enlarged by a subsequent oral agreement.

In *McCombs* v. *McKennan*, 2 Watts & Searg., 216, it was held that a parol agreement by one party to a covenant, to waive the performance of a certain part of the covenant by another party, is not such an alteration of the contract as will render necessary a change in the form of action upon it.

In the opinion it is said, on page 218:

> "If a party agrees to accept the thing to be delivered at another time or place than that stipulated, a performance of this by the other party is equivalent to a performance of the original undertaking. It imposes no new duty upon the defendant; he merely accepts as performance by the plaintiff that which would not otherwise have been so; and the defendant's liabilities on the original contract remain the same."

In *Negley* v. *Jeffers et al.*, 28 Ohio St., 90, it was held that when a deed to real estate had been executed, or title in any other way passed, subsequent agreements between vendor and vendee, as to the pecuniary liabilities growing out of the transaction, which do not take away or confer any interest in the land, but only determine the time when the purchase money becomes due, are not affected by the Statute of Frauds; that a subsequent agreement between the parties by the terms of which the vendee agreed to waive his right to insist on the performance of such conditions precedent, and take the property subject to the encumbrances, and pay the balance due, was not a contract within the Statute of Frauds, and might be proved by parol. See pages 99, 100 and 101.

In support of the foregoing, see also

*Lee* v. *Hawks*, 68 Miss., 699 (9 Southern, 828).
*Long* v. *Hartwell, Admr.*, 34 N. J. L., 116.
*Jackson et al.* v. *Litch*, 62 Pa. St., 451.
*Leathercloth Co.* v. *Hieronimus Co., L. R.*, 10 Q. B. 140 (1875).
*Fleming* v. *Gilbert*, 3 Johnson's Rep., 528.

Again, the Mount Carmel Coal Company obtained the entire benefit of the oral agreements, and the same were completely performed on the part of the Railway Company. It would be a fraud now to permit the Mount Carmel Company or its assignee to repudiate this arrangement or claim the same to be invalid, as it has had the full benefit thereof.

29 Am. Enc. of Law, 2nd Ed., page 832.

It is contended that proof of the oral arrangement to take it out of the statute must be clear, definite and conclusive; and must show a contract leaving no *jus deliberandi* or *locus poenitentiae*. If that were correct and applicable, yet there was no dispute at all under the evidence that the advances were made on account of coal which was to be furnished under the agreement. The testimony was conclusive. As the advancements had in fact been made there was, of course, no opportunity left for a *jus deliberandi* or *locus poenitentiae*.

The agreement, however, was not within the statute.

## IV.

AN ASSIGNEE OF ONE OF THE PARTIES TO A CONTRACT IN SEEKING THE BENEFITS OF ITS FURTHER EXECUTION BECOMES SUBSTITUTED IN THE PLACE AND STEAD OF HIS ASSIGNOR THEREIN AND HIS RIGHT TO THE BENEFITS AND FURTHER PERFORMANCE THEREOF IS SUBJECT TO CHANGES, MODIFICATIONS, VARIATIONS AND ADJUSTMENTS MADE THEREUNDER BY THE PARTIES THERETO PRIOR TO NOTICE OF THE ASSIGNMENT AND ALSO TO ALL EQUITIES WHICH HAD ARISEN IN FAVOR OF OTHER PARTIES TO THE AGREEMENT ARISING OUT OF THEIR DEALINGS IN RESPECT TO THE SAME WHETHER SUCH ASSIGNEE HAD NOTICE OR NOT OF SUCH CHANGES, ADJUSTMENTS OR EQUITIES, AS IT IS HIS DUTY TO MAKE INQUIRY OF THE OTHER PARTIES TO SUCH CONTRACT. HE COMES IN MERELY AS A SUBSTITUTED PARTY BOUND TO MAKE INQUIRY AS TO THE EXISTING STATUS OF SUCH CONTRACT AND THE RIGHTS OF THE RESPECTIVE PARTIES ARISING OUT OF THEIR DEALINGS UNDER OR IN EXECUTION OF THE SAME.

Of the above proposition there can be no serious doubt. Parties to an agreement being the only ones directly interested therein have the lawful right to change or modify its terms, vary from the strict letter thereof in respect to performance, make such adjustments thereunder as they may deem advisable and may deal with each other on the strength of the existing obligations of the one towards the other thus creating equities in favor of one as against the other in respect to such contract and the future performance thereof.

A stranger seeking to obtain any interest of one of the parties in such contract should have no right to affect, set aside, or ignore the dealings had in good faith between the original parties to such agreement. If permitted to come in under the agreement by assignment from one of the parties he should come in merely as a substituted party, and if he assumes to take the benefits of the agreement he should stand in no better plight with reference to the same or with reference to demanding performance from the other parties thereto than his assignor would. To hold otherwise would be to destroy the liberty of parties to an executory contract to make such changes or variations in respect to their rights thereunder and to deal with each other in the execution of any such agreement as they may see fit.

It is known to even the neophyte in the law that according to the doctrine of the old common law choses in action or rights under contracts were not assignable. Courts of equity, however, at an early day began to recognize and enforce assignments of choses in action and beneficial interests arising under certain classes of executory contracts, but attached thereto the equitable provision that such assignment should be subject to all equities which arose between the original parties until notice of such assignment by any party thereto should be given to the other party or parties interested, so as to advise such other party or parties not to deal further with the assignor in respect to either the chose in action or the contract.

Courts of law subsequently gave effect to such assignments, attaching thereto the equitable rule affect-

ing the same, but only permitted the assignee to sue in the name of the assignor, thus giving full play to such equitable rule. The only exception to the above rule is that relating to negotiable instruments, which, by the law merchant or by statute, may pass from hand to hand before due, freed, when in the hands of a *bona fide* purchaser for value without notice and before maturity, from equities and many defenses which might have been set up against the original assignor.

See 2 Pomeroy's Equity Jurisprudence, 3rd Ed., Sec. 704, and note (k) to this section on page 1230, where it is said that the debtor can set up that his contract with the assignor has not been performed, and that the assignee takes subject to all the terms of the contract; also citing *Tyler Car & Lumber Co.* v. *Wettermark et al.*, 34 S. W., 807, where it was held that the debtor might set up advances against a certain portion of lumber delivered by the assignee under the contract which had been paid for by such prior advances from the debtor to the assignor.

In *Cowdrey* v. *Vandenbrugh*, 101 U. S., 572 and 575, a latent equity was imposed in favor of the original owner of a certificate which had been transferred.

*Reeves* v. *Kimball*, 40 N. Y., 299, is directly in point. There K. contracted to sell F. certain real estate, and F. went into possession. Soon afterwards, by a second written agreement between them, it was stipulated that K. should hold the title to the premises for the security of the amount payable under the contract "and such other sums as K. should let F. have for his note, or become holden for by endorsements or otherwise

for him." Subsequently K. did make further advances to F. on his note. Afterwards F. assigned the contract and transferred the possession of the lot to R., *a purchaser without notice of K's additional lien for advances.* In an action by R., to compel K. to convey, it was held that the latter was entitled to insist upon payment of the advances under the second agreement, as well as the amount due by the terms of the contract itself, as a condition of his conveyance; that in such case the receipt by the vendor from the assignee, subsequent to the assignment, of interest upon the amount due upon the original contract, without disclosing his additional lien, created no estoppel as to that against him.

In *Creighton and Wife* v. *Ingersoll*, 20 Barbour, 541, it was held that the assignee of a contract took it subject to adjustments made thereunder or in respect thereto previous to his substitution as a party thereunder.

In *Wood* v. *Donovan*, 132 Mass., 84, it appeared that A. made an oral contract with B. for the erection of a house by B. for him. B. partially performed this contract and after sundry modifications of the contract had been made, B., with the assent of A., made a written assignment to C. of all of his right, title and interest therein. It was held that the assignment was of the contract as it subsisted after the modifications thereof, and not of the contract as originally made. It is obvious that some of the terms of the original contract having been modified they were superseded in that respect by the modifications. The court said:

"We can have no doubt that the assignment was

of the contract as it then subsisted between them, and not the contract as it subsisted between them before any modification of it. The contract had been partially executed, and it was a partially executed contract which the parties had in their minds, and according to which the plaintiff agreed to complete the house.

In this condition of things, the natural and obvious purpose of an assignment would be to finish the contract which was then a subsisting contract. * * * The time and mode of payment, equally, with its amount, are essential parts of the contract. If the price to be paid by the original contract were increased or reduced before the assignment, the price then existing would remain the price to be paid. If by the original contract the payment was to be by a note on time, and the modification of the contract was that the payment should be in cash upon the completion of the work, the payment under the assignment must be according to the terms of the contract existing at that time."

In *Homer* v. *Shaw*, 177 Mass., 1 (58 N. E., 160), a contract to do certain work was subsequently modified and then assigned by one of the parties. It was held that the assignee was merely substituted in the place of his assignor and was bound by the terms of the modification, and could not recover where his assignor could not have recovered by reason of such modification.

In *Shuttleworth et al.* v. *Kentucky, etc., Co.*, 22 Ky. Rep., 1341 (60 S. W., 534), the assignee of one of the parties to an agreement was held bound by the provisions of a collateral contract made by his assignor in respect to the property involved.

In *Clay* v. *Woodrum*, 45 Kan., 116 (25 Pac., 619), the

Supreme Court of Kansas held that a third party who avails himself of a contract between others and claims under its provisions would be affected by the equities growing out of the contract between the parties thereto.

In *Kelly* v. *Schupp and others*, 60 Wis., 76 (18 N. W., 725), it was held that an assignee of a contract is bound by such admissions made by the assignor as would have bound the assignor himself.

*Brown et al.* v. *Divitt et al.*, 131 Pa. St., 455 (19 Atl., 80), is analogous in principle to the case at bar. There was a written agreement for the sale of an interest in land under an oil lease. The purchase money, $5,000.00, was payable in installments, for which judgment notes of the vendee were given. The agreement provided that the title to the property should not pass to the vendee until the full amount of the purchase money was paid. It also contained a provision that the oil produced from the well on the premises should be run in the pipe lines to the credit of the vendors and that the vendee should receive credit for it on the last installment. Subsequently it was ascertained by the parties that the vendee was entitled to a credit of $400.00 for the oil so run, and, applying this on the last installment, there was a balance of $1,600.00 of the purchase money unpaid. This balance, by the terms of the contract, was payable on the 28th day of April, 1888. The vendee requested the vendors to extend payment of this balance one year and it was finally agreed between them that one-half of it should be paid in six months and the remainder in eighteen months. The $2,000.00 note which had been given for the last

installment was then surrendered, and two notes of the vendee of $800.00 each, payable according to the agreement of extension were substituted for it. The vendors then gave to the vendee an order on the pipe line company to allow all the oil to be run in his name. By this arrangement the vendors relinquished their rights to have the oil run in the pipe lines to their credit, and extended the payment of $800.00 one year. In all other respects the agreement remained in force as written. It was not claimed by either party to this transaction that there was any agreement by the vendors to accept the new notes as payment or to release the leasehold from the lien for purchase money. It was held that a creditor who took an assignment of this executory contract took only the equitable estate of his assignor although at the time of the assignment he may have had reason to and did believe that the agreement was executed and that his assignor had the legal title. Ejectment against the assignee to enforce payment of the purchase money on this executory agreement was sustained.

In *Mangles* v. *Dixon*, 3 House of Lords Cases, 703, it was held that the assignee of a chose in action, or security of any kind, stands in exactly the same situation as the assignor as to the equities arising upon it. *He must be taken to be cognizant of them. It is his duty to make inquiries, and, as a general rule, the creator of the security thus assigned is not bound, on receiving a simple notice of the assignment, to volunteer information.* There A. was the owner of a vessel. B. was to charter it for a particular voyage to seek a particular cargo. Its tonnage was larger than B. required. A. was willing to undertake half the risk, and was to have

half the profits. A charter party was executed, on the 24th of April, 1845, by which the vessel was declared to be let to freight, at 16s a ton per month, to B., and bills were to be given, and payments from time to time made, by B., which, taken together, would cover one-half of the amount stipulated for the freight. On the arrival of the ship at home B. was to give a bill at ninety days' date for the remainder of the freight. Two other instruments were executed on the same day; but the first of which A's clerk was to join in the adventure, and, "after payment or deduction of the freight, and all incidental expenses, the profits or loss" was to be borne by the parties in equal moieties; and by the other A. gave to B. a guarantee for the due performance by the clerk of the stipulations he had entered into. On the 1st day of December, 1845, while the ship was on the voyage, A. assigned to C., the charter party, and wrote on the margin thereof a note addressed to B. requesting him to pay "what was due." C. gave B. notice of this assignment and note. The notice was in the ordinary form, and C. made no inquiries of B. B. continued the payments which by the stipulations in the charter party, he was bound to make. The vessel returned in August, 1846, and the adventure turned out a loss. B. claimed as against C. to balance the account of profit and loss, as he would have been entitled to do with A. had the charter party not been assigned. Held, that in equity he was entitled to do so.

The Lord Chancellor, St. Leonards, said, on page 735:

> "The authorities upon this subject, as to liabilities, show that if a man does take an assignment

of a chose in action he must take his chance as to the exact position in which the party giving it stands."

Further, he said, on page 737:

"Where a man takes an assignment of a mortgage and gets the legal estate; even in that case he has not done sufficient for his perfect security to take it without having communication with, and obtaining the concurrence of, the mortgagor; for, whatever be the state of the account, although he gets a transfer of the legal estate, he is bound by the state of the account; and he cannot recover a shilling beyond what is actually due, although there is no endorsement of payments upon the mortgage deed, and although he has no notice of a single shilling of the money having been paid off. The rule, therefore, is perfectly clear."

In *Smith* v. *Orton*, 131 U. S. (appendix lxxv), it was held that the assignee of a bond took it subject to the equities of the original obligor or any defenses in respect thereto against the assignor, and *was bound to make inquiries of the obligor in respect to these matters.*

In *Wood* v. *Perry*, 1 Barb., 114, it was held that the assignee of a contract takes the same subject to all equities existing in favor of the other party against the assignor although such assignee may not have had notice of them at the time.

In *Townsend* v. *Corning*, 1 Barb., 627, a court of equity held the assignee of a contract for the purchase of land as taking the land subject to all the equities and liabilities resting upon the assignor at the time of the assignment, and that such assignee was therefore in equity bound to pay costs upon a note given for a

back installment due on the contract at the time of the assignment.

In *Lattomus* v. *Garman*, 3 Del. Ch., 232, it was held that a credit actually allowed by the assignor or *agreed to be allowed* before assignment will bind the assignee for value, whether with or without notice.

In Vol. 3, Current Law, page 335, it is said, referring to the assignment of contracts:

> "The assignee is not a *bona fide* holder, but he takes the property or right subject to all the equities existing between the parties; he is chargeable with any notice or knowledge the original creditor possessed of fraud on the part of the debtor affecting the collection of the debt, he takes the right subject to forfeiture for the acts of the assignor, and is bound by any settlement, or release, entered into by the assignor to the assignment."

See also, *Connor* v. *Parker*, 114 Mass., 331.

In *Murray* v. *Gouverneur, et al.*, 2 Johns. Cas., 438 (1 Am. Dec., 177), A. contracted to sell a house and lot to B. C. purchased of B. all his right thereunder, etc. It was held that C. though a *bona fide* purchaser *without notice*, must take the property subject to all the equities existing between the original parties, A. and B.

See also,

1 Parsons on Contracts, 9th Ed., star pages 227, 228 and 230.

Page on Contracts, Vol. 3, Sec. 1269.

## V.

THE RECEIVERS AND TRUSTEES IN BANKRUPTCY, IN ASSUMING TO TAKE THE BENEFITS UNDER OR TO CARRY OUT THE LEASE AND AGREEMENT OF THE MOUNT CARMEL COAL COMPANY, STOOD IN THE SAME PLIGHT AS THAT COMPANY IN RESPECT TO SUCH CONTRACT, AND COULD ONLY ASSUME IT OR TAKE THE BENEFITS THEREUNDER SUBJECT TO ALL ADJUSTMENTS THERETOFORE MADE AND TO ALL EQUITIES IN FAVOR OF ALL THE OTHER PARTIES TO SUCH AGREEMENT AND IN THE EXACT CONDITION IS WHICH SUCH CONTRACT WAS AT THE DATE OF THE ADJUDICATION IN BANKRUPTCY.

The receivers and trustees in bankruptcy, representing as they did general creditors, came in as mere volunteers and not as purchasers in good faith. No doubt they might, under the authority of *Watson* v. *Merrill*, 136 Fed., 359, assume or reject the executory contracts of the bankrupt as might be deemed most beneficial or advantageous to the estate; and no doubt under clauses 3 and 5 of Section 2 of the Bankrupt Act, the bankruptcy court had the power to authorize the receivers and trustees to continue the business of the bankrupt, and to that end they might assume, therefore, the executory contracts of the bankrupt. It is obvious, however, that there existed no authority either in the bankruptcy court or in the receivers or trustees under the law to authorize or force upon the other parties to such a contract a different arrangement than that which at the time existed with the bankrupt. It is also obvious that general creditors, having no voice in the contracts made by their debtor, could not complain of any modifications made therein or

adjustments made thereunder by such debtor and other parties to the agreement.

The lease and agreement in question was not a matter of public record and indeed not being acknowledged could not have been recorded. It is not to be assumed, therefore, that general creditors gave credit to the Mount Carmel Coal Company upon the strength of this outstanding executory contract. As the verbal arrangement between the Mount Carmel Company and the Railway Company made with reference to this agreement was not required to be made a matter of record, creditors cannot complain that they were misled by the fact that the arrangement in question was merely verbal. If, therefore, for their benefit advantage is sought in having this executory contract of the bankrupt carried out, it is obvious that this should not be done to the prejudice of the other parties to the contract, who have acted within their lawful rights and in good faith in making any adjustments thereunder or modifications in respect to any performance thereof and who have dealt with the Mount Carmel Company upon the strength of its existing obligations thereunder.

From an early day equitable principles have been applied in respect to controversies which have arisen under bankrupt laws. In the early case of *Chapman* v. *Tanner*, I Vernon, 267, the equitable doctrine of a vendor's lien for unpaid purchase money was perhaps first announced in respect to the estate of a bankrupt. In that case it was held that if A. sells land to B., who afterwards becomes a bankrupt, and a part of the purchase money has not been paid, A. shall not be bound

to come in as a creditor under the statute, but the land shall stand charged with the money unpaid, though there was no agreement for that purpose. It was there stated:

> "Another point in this case was, that the bankrupt having bought land, and all the purchase money not being paid, the assignees would have had the vendor come in as a creditor under the statute for the remainder of his purchase money. *Per Cur.* In this case there is a natural equity, that the land should stand charged with so much of the purchase money as was not paid, and that, without any special agreement for that purpose."

Such equitable lien, as is well known, was cut off by a sale or mortgage to a *bona fide* alience without notice, but in the case of a bankrupt it was held that the creditors came in as mere volunteers and stood in no better position than the bankrupt.

See also II Story's Equity Jurisprudence, 12th Ed., Section 1038.

In Section 1228 of the latter work, it is said:

> "We have already had occasion to state, that the lien of the vendor exists against the vendee and against volunteers, and purchasers under him with notice, having an equitable title only. * * * The lien will also prevail against assignees claiming by a general assignment under the bankrupt and insolvent laws, and against assignees claiming under a general assignment, made by a failing debtor for the benefit of creditors; for in such cases assignees are deemed to possess the same equities only as the debtor himself would possess."

Under Section 70 of the Bankrupt Law the trustee is "vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt." There are but few exceptions in the bankruptcy

law to this, as in the case of a fraudulent conveyance by the bankrupt, or such liens upon property as the laws of the state in which it is located require to be recorded for the purpose of giving notice to general creditors.

As to the executory contracts of the bankrupt it would seem obvious that the receiver or trustee of the bankrupt cannot insist that he stands in a better position with reference to the other parties thereto than the bankrupt himself in respect to the right to have such agreement carried out.

In Sir William Anson's excellent work on Contracts (2nd Am. Edition of Knowlton) that eminent author says on star page 232:

> "Representation, whether in the case of death or bankruptcy, operates to confer in the one case upon the executors or administrators of the deceased, in the other upon the assignees of the bankrupt, his rights and liabilities; but the assignment is merely a mechanical contrivance for continuing, up to a certain point and for certain purposes the legal existence of the deceased or bankrupt. They to whom the contract is assigned take no benefit by it, nor are they personally losers by the enforcement of it against them. *They merely represent the original contracting party to the extent of his estate, and no more.*"

See also pages 223 and 224 of the same work.

It has, therefore, been consistently held by this court that under the present bankrupt act the trustee takes the property of the bankrupt, in cases unaffected by fraud, *in the same plight and condition that the bankrupt himself held it*, and subject to all the equities impressed upon it in the hands of the bankrupt.

See *York Mfg. Co.* v. *Cassell et al.*, 201 U. S., 344, and 352, in which it appeared that a conditional sale of property was made which was not filed as required by the Ohio statute and which would have been void as against subsequent attaching creditors or mortgagees, as it was nevertheless good between the parties it was held the title of the vendor would still be good against the trustees in bankruptcy.

To the same effect see:

*Hewit* v. *Berlin Machine Works*, 194 U. S., 296.

*Stewart* v. *Platt*, 101 U. S., 731.

*Yeatman* v. *Savings Institution*, 95 U. S., 764.

*Thompson* v. *Fairbanks*, 196 U. S., 526.

In *Hauselt* v. *Harrison*, 105 U. S., 401, A. entered into a written contract with B., whereby in consideration of moneys advanced by the latter for the purchase of skins he agreed that he would tan, finish and deliver them to B. B., in consideration of a commission on sales and a further percentage to cover insurance, storage and labor agreed to sell them, and put the proceeds less his commission and advances, at the disposal of A. It was further agreed that all the skins, whether green, in the process of tanning, tanned, or tanned and finished should be considered as security for refunding the moneys advanced. The business was, for about six months, carried on until A. became unable from sickness and financial embarassment, to proceed with it, and he was then indebted to B., who was aware of his condition. They, in order to carry out the first agreement, entered into another, whereby B. was to take possession of A's tannery and run and use it with

such materials there as would be necessary to finish and complete the skins and sell them, the net proceeds to be put to the credit of A. after deducting advances and expenses. A., four days thereafter, filed his petition in bankruptcy. B. took possession of the tannery, and A's assignee in bankruptcy brought replevin for the skins. It was held that A. had not an unqualified property in them, but that they were subject to a charge in the nature of a mortgage in favor of B. which was binding on the parties and A's assignee in bankruptcy. On page 406, it is said:

> "The assignee takes the title, subject to all equities, liens, or encumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. * * * He takes the property in the same plight and condition that the bankrupt held it."

In *Scott* v. *Armstrong*, 146 U. S., 499, it was held that the receiver of an insolvent bank took no greater rights in the property of the bank which came into his possession than that which the insolvent bank possessed. The assignee in bankruptcy, except in cases of fraud, stood in no better situation than the bankrupt.

See:

*Winsor* v. *McLellan*, 2 Story, 492 (Fed. Case No. 17,887).

*Winsor* v. *Kendall*, 3 Story, 507 (Fed. Case, No. 17,886).

*Ex parte Newhall*, 2 Story, 360 (Fed. Case, No. 10,159).

In *Mitchell* v. *Winslow et al.*, 2 Story, 630 (Fed. Case, No. 9,673), Mr. Justice Story said:

> "Now, it is most material to bear in mind, under this aspect of the case, that it is a well established doctrine, that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy; and, consequently, they are affected with all the equities, which would affect the bankrupt himself if he were asserting those rights and interests. This was expressly laid down by Lord Hardwicke in *Brown* v. *Heathcote*, 1 Atk., 160, 162, where he said: 'The ground that the courts go upon, is this, that assignees of bankrupts, though they are trustees for the creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could. Therefore, assignments of choses in action for a valuable consideration, have been held good against such assignees.' The same doctrine was recognized by his lordship in *Jewson* v. *Moulson*, 2 Atk., 417, 420. Sir William Grant (M. R.), in *Mitford* v. *Mitford*, 9 Ves., 87, 100, said: 'I have always understood the assignments from the commissioners, like any other assignment by operation of law, passed his (the bankrupt's) rights, precisely in the same plight and condition as he possessed them. Even where a complete title vests in them and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to. *This shows that they are not considered purchasers for a valuable consideration, in the proper sense of the words. Indeed a distinction has been constantly taken between them and a particular assignee for a valuable consideration; and the former are placed in the same class as voluntary assignees and personal representatives.*'"

See also the opinion of Sir William Grant, Master of Rolls in *Mitford* v. *Mitford*, 9 Ves. Jr., page 100.

See also:

*Brown* v. *Heathcote*, 1 Atk., 160, 162.
Collier on Bankruptcy, 5th Ed., 554.
*Chattanooga Natl. Bank* v. *Rome Iron Co.*, 102 Fed., 760.

In *Lindeke* v. *Associates Realty Co.*, 146 Fed., 631, it was held that a notice of forfeiture of a lease given to the lessee was binding on the trustees in bankruptcy of such lessee.

In *Whitney* v. *Eaton et al.*, 15 Gray, 225, there was a sale of goods conditioned on the payment of a six months' note. A few days after the purchase and delivery of the goods and a long time before the note would have become due if given, the buyer assigned for the benefit of creditors. It was held that the vendor was not concluded by the entry in the broker's books, but might prove by any competent evidence, oral or in writing, that payment by note was part of the contract. It was also held that the sale was conditional on such payment, that the vendor had not waived the performance of the condition although he had delivered the goods without demanding the note, and that the title to the goods had not vested in the purchaser or his assignee in insolvency.

In *Lamb* v. *Hall et al.*, 147 Calif., 44 (81 Pac., 288), it was held that a trustee in bankruptcy claiming under a lease to the bankrupt was bound by an assignment of a half interest of a portion of the leased premises made by the bankrupt prior to the bankruptcy.

See *Foster* v. *Hackley & Sons*, 2 N. B. R., 416, 417, where among other things, it was said that it was not

the purpose of the bankrupt law to interfere with and avoid contracts made by the bankrupt with other parties, or to prevent their execution.

See also:

*Chace* v. *Chapin*, 130 Mass., 129.

In *Van Waggoner* v. *Moses*, 26 N. J. Law, 570, it was held that property assigned by an insolvent was bound by an execution, though not levied before the assignment, and also that the judgment creditor did not waive his rights under his execution by claiming as a general creditor under such assignment.

In *Sayre* v. *Weil*, 94 Ala., 466 (10 Southern, 546), defendant deposited money in a bank to the credit of himself as "trustee for G. children." He also owed the bankers on his note, and directed them to apply such trust fund toward the payment of the note. They agreed to do that, and to deliver the note as soon as their cashier could make proper entries. Before the note was delivered they assigned for the benefit of their creditors. In an action on such note by the assignees it was held that the agreement to apply such trust fund bound the bankrupt and that the assignees were invested with no higher or more extensive authority than the bankrupt. The same defendant had made another deposit in the name of his wife and it was understood by the bank that he could check against this deposit. He subsequently checked against the deposit but his wife had not drawn upon it. At the time defendant directed the application of the trust fund toward the payment of his note, he directed, also, that enough be taken from the deposit in the name of the wife to pay the balance due on the note. The bankers

agreed to this and the wife ratified the act of the defendant. Held, that this agreement bound the bankers.

In *Hasbrouck* v. *Stokes et al.*, 13 N. Y. Suppl., 333, it was held that a general assignee for the benefit of creditors of a lessee took a lease subject to the right of the lessor to forfeit the same for a default of the assignor prior to the assignment. In other words, that such assignee could not take the benefits under the lease without discharging the burden which had attached thereto among other things, without removing the default of his lessor which had subjected such lease to a forfeiture.

In *Spencer* v. *World's Columbian Exposition*, 58 Ill. App., 637, a receiver was appointed to carry on the business of an insolvent company upon the Exposition grounds, and it was held that the rent or percentage of profits due from the insolvent to the Exposition for the concession, was a part of the expenses which had necessarily to be paid by the receiver in order to be permitted to carry on the business and should be paid by the receiver out of funds in his hands in preference to creditors.

In *Longstreth* v. *Penock et al.*, 15 Fed. Cas., No. 8,488, it was held that rent for a store occupied by a bankrupt, and subsequently by his assignee, where there was sufficient goods to satisfy rent on distress, should be paid in full by assignee up to the time of the surrender of the property. There was rent in arrear at the time of the bankruptcy.

See also:

*O'Hara* v. *Jones*, 46 Ill., 289.

In the case of *Fourth Street Bank* v. *Yardley*, 165 U. S., 635, an equitable lien upon certain funds of a debtor in the hands of a third party was created in favor of a bank upon the insolvency of such debtor, such lien being implied from the nature of the dealings of the parties.

On page 644 it is said:

> "A party may, by agreement, create a charge or claim in the nature of a lien on real as well as on personal property whereof he is the owner or in possession, which a court of equity will enforce against him and volunteers, or claimants under him with notice of the agreement."

In *Howe* v. *Harding*, 76 Tex., 17 (13 S. W., 41), it was held that where a railroad company, in consideration of a right of way, had contracted with the grantor for the erection of a tank on his land for its use to be supplied with water from his spring, and agreed to pay him therefor, a lien to secure such payment existed on the earnings of the road in the hands of a receiver subsequently appointed, and who continued to use such right of way.

Referring to this case, it is said in Beach on Receivers, Alderson's Edition, Sec. 328:

> "It was correctly asserted that where the receiver enjoys the benefit of a contract he must assume its burdens."

In *Knowles* v. *Lord*, 4 Wharton, 500 (34 Am. Dec., 525), it is said on page 529:

> "But a voluntary assignment by a debtor has never been considered as placing the assignee in any other situation in point of equity than the assignor himself was; he takes the estate subject to all outstanding equities, liens, incumbrances, and

> *dealings* between the assignor and others; and such has been the uniform construction put on assignments of this description."

In *In re MacDonald*, 138 Fed., 463, it was held that the trustees in bankruptcy were not entitled to hold unfinished ships as against the party for whom the bankrupt had been building them and who had made payments on the same.

To the same effect see *In re Rockford, R. I. & St. L. Rld. Co.*, 1 Lowell, 345 (20 Fed. Cas., 11, 978).

Of course, the trustees in bankruptcy cannot apply that part of a transaction or agreement which is beneficial and repudiate or reject that which is burdensome.

Thus *In re Standard Laundry Co.*, 112 Fed., 126, it is said:

> "A party cannot apply to his own use that part of the transaction which may bring to him a benefit and repudiate the other, which may not be to his interest to fulfill."

See, also:

*In re Kellogg*, 112 Fed., 52.

*Goddard* v. *Weaver*, 1 Woods, 257 (Fed. Cas., 5, 495).

It would be an unwarranted exercise of power on the part of the court to permit its trustees and receivers to continue in possession and to continue in effect the executory contract of the bankrupt, and at the same time exclude the other parties thereto from rights which had arisen thereunder, when they would have had the right to repudiate on account of the defaults of the bankrupt and of the receivers.

Now, at the time of the bankruptcy there was in

force and effect between the parties a written lease and agreement in respect to which the Railway Company had by its advancements acquired the right to performance of the obligations of the bankrupt in the way of delivering coal thereunder the equivalent of such advancements without paying again for the same. This was the plight and condition under the lease and agreement when the receivers in bankruptcy undertook through the instrumentality of the court to secure for the benefit of general creditors the benefits thereof. Such general creditors, of course, were not entitled to any of the earnings or profits derived from the lease and contract in question or such as might be derived from the further carrying out of the same until all obligations of the bankrupt and receivers in bankruptcy in respect to the same had been fully discharged. It would be indeed inequitable for the court to permit its receivers to retain possession of the leased premises and continue the contract in operation for the benefit of strangers, taking the profits to be derived therefrom, and at the same time to repudiate the obligations and burdens in respect to the same which had been imposed in good faith upon the bankrupt prior to his bankruptcy and by legitimate dealings of other parties thereto upon the strength thereof.

If a contractor had undertaken to construct a building or other structure for another party and in the agreement such other party had agreed to pay in installments as the building progressed, but, to accommodate such contractor he had in fact afterwards paid an installment prior to the date the same would become strictly payable by making advancements to the

contractor on the strength of the latter's obligations, would it be pretended that an assignee of the contractor, had the latter become bankrupt, could claim the right to finish the building and ignore the advancements theretofore made, and insist that all such payments, as by the strict letter of the original agreement would become payable thereafter, should still be made. Could such an assignee take the benefit of such contract, complete such structure, and recover all installments without crediting the advancements or prepayments made? If so, then the assignee or the bankrupt estate would take such contract as property of the bankrupt and stand in much better plight in respect thereto than the bankrupt himself would and the other party who was not at fault would be remediless. Thus parties to an agreement, who had a lawful right to modify or adjust their arrangements under the same, would then discover that, without any fault of their own but on account of the fault of some other party to such agreement, their rights thereunder would be materially altered and their standing in respect to the same materially prejudiced.

## VI.

THE RECEIVERS AND TRUSTEES BEING IN POSSESSION UNDER THE PROTECTION OF THE BANKRUPTCY COURT, THAT COURT WAS BOUND TO SEE THAT ITS OFFICERS DEALT FAIRLY AND HONESTLY WITH THE RAILWAY COMPANY AND THAT IF THEY CONTINUED TO ASSUME FOR THE BENEFIT OF THE BANKRUPT ESTATE OR GENERAL CREDITORS AN EXISTING AGREEMENT AND HOLD PROPERTY COVERED THEREBY UNDER THE POWER OF THE COURT, THEY WERE BOUND IN EQUITY AND GOOD CONSCIENCE TO DISCHARGE THE OBLIGATIONS AND BURDENS WHICH HAD ATTACHED THERETO BY REASON OF PRIOR DEALINGS OF THE OTHER PARTIES AND THE BANKRUPT IN REFERENCE THERETO.

The position and contention of the receivers and trustees has at all times been wholly inequitable and unjust to say the least. By virtue of their possession which was being protected by the court they arbitrarily proceeded to deal with the agreement and the rights of the bankrupt thereunder as they saw fit, repudiating a just claim of the Railway Company that it was entitled to performance from the bankrupt to the extent the same had been paid for by the advances, and that such obligation had attached to and become a part of the existing arrangement. The conduct of the Railway Company was entirely equitable and just. It did not seek to obtain any advantage over the receivers or trustees by demanding an absolute cancellation of the agreement, but gave them due notice of its claim and demanded as a matter of justice that the court should direct the receivers or trustees to at once make their election so that the Railway Company

should not be further prejudiced by reason of the fact that the property covered by the lease and agreement had been seized by and was in the custody and under the power of the court. A refusal to make the election under the circumstances was not only unjust but arbitrary and the continued possession by the trustees was wrongful to say the least.

Under the bankruptcy law the bankruptcy court is regarded as a court of equity and is invested with equity jurisdiction.

*In re Kane*, 127 Fed., 553.
Section 2, Bankruptcy Act.
*Bardes* v. *Hawarden Bank*, 178 U. S., 535.

It is bound not only to deal equitably, but to see that its officers set an example of honesty and fairness.

Thus *In re Tyler, Official Receiver, Ex parte*, King's Bench Division (1907), Volume 1, page 865, it was held by the Court of Appeals that where a wife had paid the premiums and interest on a policy held by her husband before and after the bankruptcy of the latter and where insurance was collected by the official receiver he would be required to reimburse the wife for the amount so expended.

Mr. Vaughn Williams, L. J., said on page 869:

> " 'I am of opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The court, then, finding that he has in his hands money which in equity belongs to some one else ought to set an example to the world by paying it to the person really entitled to it. *In my opinion the court of bankruptcy ought to be as honest as other people.*' "

Referring then to cases of money paid under mistake of law in which a court of law would not allow a recovery in an action between private parties to avoid a greater evil in order to put an end to litigation, he continues:

> "Although the court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. *It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law.*"

On page 870, he continues:

> "In this particular case, having regard to the fact that these policies were entered into by the bankrupt before the commencement of his bankruptcy, and then the wife at his request advanced the money to pay the premiums, it seems tolerably plain, quite irrespective of the rule in *Ex parte* James and *Ex parte* Simmonds, that she had such an interest in the policies as entitled her to prevent the trustees or other representative getting the benefit of those policies without recouping the premiums which she had paid."

That principle is recognized *In re Chase*, 124 Fed., 753, (Circuit Court of Appeals, First Circuit), in the language quoted therefrom by the Circuit Court of Appeals in the case at bar, as follows:

> "It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt and that *he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant.* Williams' Law of Bankruptcy, Seventh Edition, 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the

trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts of common law or chancery."

To the same effect, see:

*Hutchinson* v. *Le Roy*, 113 Fed., 202, (51 C. C. A., 159).

*Hutchinson* v. *Otis*, 115 Fed., 937 (53 C. C. A., 419).

*Batchelder & Lincoln Co.* v. *Whitmore*, 122 Fed., 355.

*In re Rochford*, 124 Fed., 182 (C. C. A., 388).

Authorities illustrating this principle are numerous and preferential claims have been established against the bankrupt estate by reason of the dealings and acts of the trustee.

In *William Openhym & Sons* v. *Blake*, 157 Fed., 536 (C. C. A., 8th Circuit), a seller of goods to a bankrupt rescinded for fraud and notified the trustee, but was prevented by the court from replevying the goods. It was held that he might intervene if the goods were sold by the trustee and have his claim established as preferential.

In *Erie R. R. Co.* v. *Dial*, 140 Fed., 689 (C. C. A. 6th Circuit), a manufacturing corporation a short time before its bankruptcy, purchased rubber to manufacture into tires, which were to be paid for on delivery. The rubber was shipped with drafts attached to the bill of lading. The railroad company unloaded the rubber upon a platform near the bankrupt's factory, on which freight destined to the bankrupt and other parties in that locality was customarily unloaded, and to

which there was a switch track, and it was forthwith taken and used by the bankrupt with other rubber, in the making of tires before the drafts by the vendor were presented. The drafts were not paid. Claims being made on the railroad company by the shippers for wrongful delivery, the railroad company purchased and took assignments of the claims of the shippers against the bankrupt. Held, that the action of the bankrupt in taking possession of the rubber and mingling it with its own property without making payment therefor was wrongful, and gave it no title as against the shippers or their assignee (the Railway Company), who succeeded to their rights, and that such assignee was entitled to recover from the bankrupt's trustee, in preference to general creditors, the value of such portion of the rubber or its proceeds as came into his hands.

On page 691 the court held that a court of equity will accord a lien in favor of the owner upon the mass of property for the value of the things intermingled and that the interest of the trustee in bankruptcy was no other or greater than that of the bankrupt. The order of the District Court refusing to allow the claim as preferential was, therefore, reversed and the cause remanded with instructions to ascertain what part of the assets of the bankrupt were chargeable with a lien in favor of the petitioner upon the principles affirmed by this opinion, and to take proofs if necessary, for that purpose, and thereupon order that the trustee pay those claims of the petitioner which were acquired from the shippers with interest from the time they accrued to the extent of the sum of such assets. That was done because the proceedings in the court below

did not go far enough to fix data necessary for the Appellate Court to make a decree. See, also, pages 691 and 692.

*In re J. F. Grandy & Son*, 146 Fed., 318, 319, an equitable lien in favor of a wife was established by the court on policies held by her husband who became a bankrupt though he did not assign the same until he became insolvent. There was a parol agreement to assign in consideration of her release of dower in property which he wished to transfer.

In *Baer Sons Grocer Company* v. *Williams*, 43 W. Va., 323 (27 S. E., 345), goods were ordered before but delivered after a trust deed for the benefit of creditors was executed. The trustee took them into stock and sold them along with other goods. The court held that this charged the value of such goods as a prior lien on the trust funds in the hands of such trustee. On page 348 it is said:

> "The trustee, instead of returning them, as he should have done, took possession of them and put them in the stock. They were sold at retail along with the other goods, and the proceeds thereof went to swell the funds of the trust. To allow their retention, unpaid for, would be to perpetrate a fraud upon the appellants."

*In re Cramond*, 145 Fed., 976, an equitable lien, good under the bankruptcy law, was established, on moneys thereafter earned, in favor of a bank making advancements to a contractor to enable him to perform his contract with a city.

*In re Royea's Estate*, 143 Fed., 182, an equitable lien was imposed upon the bankrupt estate on account of a general deposit made by the bankrupt of trust funds.

*In re Loveland*, 155 Fed., 838, a mortgagor after having paid part of the mortgage debt borrowed further sums from the mortgagee and endorsements were made upon the mortgage note to the effect that such sums should be added to the amount previously remaining due thereon. It was held that the mortgage was a lien in equity for the full amount of the debt as so increased as against the mortgagor's trustees in bankruptcy.

In *Hanson* v. *Blake & Co.*, 155 Fed., 342, an equitable lien was impressed upon insurance policies in the hands of a trustee in bankruptcy on account of an oral agreement between the bankrupt and parties advancing funds towards the construction of the building insured under the understanding that the same should be insured for their benefit.

In *Frazer* v. *Hallowell*, 1 Binney, 126 (Pa.), A., as an agent for B., and to secure a debt due him, took a mortgage of real estate in his own name from the debtor and then obtained a release of the equity of redemption. A. retained the title deeds and B. received the rents and profits. Afterwards A. lent his notes to B. and finally took them up, shortly after which B. was declared a bankrupt. It was held that B.'s assignee could not recover the premises from A. until they reimbursed him the amount so paid for B.

As stated heretofore in *Howe* v. *Harding*, 76 Texas, 17, a lien was impressed upon the earnings of a railroad in the hands of a receiver because the receiver had taken and enjoyed the benefit of a contract made in consideration of the granting of a part of the right of way.

In *Clyde* v. *Richmond & D. R. Co.*, 63 Fed., 21, it was held that receivers who took possession of and operated leased lines of railroad for more than a year, and received the earnings thereof, were bound to disburse the same in accordance with the terms of the lease; and where they applied such earnings to the payment of interest on the bonds, when the lease required that the taxes should be first paid, the court would require them, even after the leased roads had been surrendered, to restore the diverted money by paying the taxes in question. Part of the taxes in question had accrued a couple of years prior to the receivership.

On page 24, Judge Simonton said:

> "When receivers are appointed for a line of railroad embracing leased lines, they do not necessarily assume the responsibility for the covenants of any of the leases, nor take the place of the lessees. They must have reasonable time within which to determine what they will do, and whether it is for the interest of the trusts committed to them to undertake the leases. * * * But if the receiver after a reasonable time continues to use and operate the leased lines, he is bound by the terms of the lease (*Woodruff* v. *Railway Co.*, 93 N. Y., 609; *Brown* v. *Railroad Co.*, 35 Fed., 444); certainly to the extent of the earnings of the lines. (*Central Trust Co.* v. *Wabash, St. L. & P. Ry Co.*, 34 Fed., 259.) In the present case the receivers took possession of all these leased lines, operated them, received and disbursed the earnings, from June, 1892, to August, 1893. They practically, by payments, recognized the terms of the lease, and acted under them. They paid operating expenses, a large part of the taxes, and the interest on the mortgages. By their report in evidence, they were in receipt of earnings from the system large enough to pay all operating expenses, insurance and taxes, and a large part of the interest.

> These earnings went into their hands because of this lease. Whether they received them as lessees, or in any other capacity, they were bound to disburse these earnings in accordance with the terms of the instrument under which the earnings were received. Under the lease, these earnings were to be applied first to the operating expenses, insurance and taxes, before they were applied to the coupons on the mortgage bonds. The payment of the latter was a diversion of moneys appropriated to the taxes, and this diversion must be restored. These receivers must pay all balances of taxes for the periods stated which are lawfully due, and it is so ordered."

As stated heretofore, in *Spencer* v. *World's Columbian Exposition*, 58 Ill. App., 637, a receiver of an insolvent company, carrying on its business on the exposition grounds, was directed to pay a percentage of profits due from the insolvent to the Exposition for the concession, as a part of the expenses of administering the estate.

The referee in bankruptcy, however, stated in his opinion (Rec., 31 and 32):

> "Although there are equities in favor of petitioner's claim, by reason of having advanced money to meet pay rolls and keep the Mount Carmel Coal Company a going concern, I can find nothing in the law which will justify the court in giving the claim priority over those of other creditors."

He at the same time held that intervenors were not entitled to a cancellation or termination of the agreement as to the trustees. It is obvious that by taking a narrow view of the law, he just missed making a correct decision.

It would seem they had a better notion of equitable

remedies more than a hundred years ago. Thus in *Legard* v. *Hodges*, 1 Ves. Jun. 477, 478 (30 Eng. Rep. Full Reprint, 447), before Lord Thurlow in 1792, it was held that a covenant to set apart and pay annual profits of land was in equity a lien or charge on the land against the covenantor and claimants under him with notice. To the contention that it was but a mere personal covenant and referring to a former case, he said:

> "Excluding that case, none of the rest go to establish a proposition in contradiction to this maxim, which I take to be universal, that wherever persons agree concerning any particular subject, that in a court of equity as against the party himself, and any *claiming under him voluntarily* or with notice, raises a trust. These persons have so claimed; and, therefore, this is a pure trust estate, and they must be declared trustees for one-third of the annual profits, and must account from the time of taking possession, having all just allowances."

This decree was affirmed as to the principle point on a rehearing before Lord Loughborough, C., in 1793, 4 Bro. Ch. Ca., 421, (29 Eng. Rep. Full Reprint, 969).

The Railway Company was wholly at the mercy and within the power of the court. It needed coal daily for the operation of its lines. It was justly entitled to be supplied from the mines which had been seized by the court. It was entitled to have its coal supplied in accordance with the arrangements existing at the date of the bankruptcy. The possession and operation of the receivers could only be lawfully maintained by accepting and complying with the existing agreement. A retention of possession in repudiation of any part of that agreement would necessarily be unauthor-

ized and wrongful. If the existing arrangement was not to be carried out by the receivers the Railway Company was entitled to have the mines surrendered at once to its affiliated companies, the lessors, or to the Mount Carmel Coal Company so that it could be supplied according to the existing arrangement. But the court and its officers have arbitrarily and unjustly withheld possession unless it be held that the agreement with the existing burdens has been assumed by the acts of the receivers and trustees for the benefit of the bankrupt estate. As it cannot be assumed that the court intended to act wrongfully and arbitrarily it follows as a result that it must be held that the contract with the existing burdens and equities in favor of the Railway Company has been assumed and its claim must be paid as an expense of administration and is, therefore, preferential.

## VII.

THE RELIEF ASKED FOR WAS ENTIRELY EQUITABLE BUT WAS MISCONCEIVED BY THE DISTRICT JUDGE AS MERELY ASKING FOR A STRICT FORFEITURE.

It was said in the opinion of the lower court and is reiterated in the argument, that a breach of the verbal arrangement, though engrafted on the lease, would not justify a forfeiture as no forfeiture was provided for in the verbal arrangement; that forfeitures are not favored in the law, and authorities are cited to support the last contention. The intervening petition did not ask for an absolute forfeiture or, indeed, an absolute termination of the written lease

and agreement because of any default of the receivers, but it specified the nature of the default and asked the court to either have the default satisfied or the contract terminated in accordance with its terms, and in the latter event for possession of the property covered thereby. A refusal of such relief whereby the trustees were permitted under the power and protection of the court to continue to take the benefits of the lease and agreement and repudiate a burden which had attached thereto, was altogether inequitable and prejudicial to the rights of the Railway Company.

The court evidently did not comprehend the alternative nature of the relief asked, but attempted to dispose of each phase thereof separately and independently—thus failing to grasp the equity of the case as really presented.

However, it has been well said even in respect to conditions for forfeitures, in *Brewster* v. *Lanyon Zinc Co.*, 140 Fed., 803 and 819:

> "There is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice and morality than to withhold equitable relief."

That was approved in *Lindeke* v. *Associates Realty Co.*, 146 Fed., 631, 639 and 640.

In the 17th article of the written lease and agreement (Rec., 49) it was provided that the Railway Company might itself terminate the entire agreement for failure of Devlin, or his assignee (the Mount Carmel Coal Company) to perform any of his obligations, if within thirty days after written notice of such failure and the nature thereof, he did not cure such fail-

ure by performance satisfactory to the Railway Company. Now, if the bankrupt, after the advancements had been made, had declined to furnish more coal under the agreement unless it was paid again therefor by the Railway Company to the equivalent of such advances, it would seem clear that such refusal would be a refusal to comply with an obligation under the written contract, and that the Railway Company might give the thirty days' notice and terminate the same as therein provided. An assignee of the Mount Carmel Coal Company would be under the same obligations and subject to the same conditions if he undertook to assume the contract. He would have no greater rights. In view of the substitution of the receivers in bankruptcy in the place and stead of the bankrupt and of the possession of the bankruptcy court, the intervening petition which was filed sufficiently performed the office and function of any such notice required by the contract, and was, indeed, the only appropriate method which could have been adopted by the Railway Company under the circumstances to have the default cured or the agreement terminated. The intervening petition was on file a sufficient length of time to enable the receivers in bankruptcy to comply and thus obviate any ground for termination. To say that they did not have sufficient formal notice under the intervening petition so as to be afforded every opportunity which was intended in the written contract to enable them to comply with the obligation of the bankrupt and restrain the default, would be an attempt to so technically construe the provisions of the written agreement as to be entirely inequitable and unjust under the existing circumstances. It was not necessary, of course, in the

verbal arrangements covering advances to make specific provision for termination of the written lease and agreement in case the Mount Carmel Coal Company should refuse to deliver coal as required by the agreement unless the same was paid for again because, as stated, such refusal to deliver without just cause and except for some default of the Railway Company would be a breach of its obligations as stated in the written contract.

Again, it may be said that at the date of bankruptcy the contract and arrangement with the bankrupt might be shown by the writing and the verbal agreements covering advances, which verbal agreements varied, to the extent acted upon, the mode of performance of the Railway Company, but did not change the obligations of the Mount Carmel Coal Company. It is evident that if the latter company had repudiated the verbal arrangements which had become engrafted upon the written contract and had refused to deliver more coal to the Railway Company unless it should be paid again for the same after delivery, the Mount Carmel Coal Company would be held as repudiating a substantial part of the existing contract which repudiation would have justified the other parties, upon general principles of law, in terminating such contract and in claiming that they were no longer bound thereby because of such repudiation.

A refusal to make a single delivery under a contract requiring continued deliveries of articles specified as required by the provisions of an existing agreement unless the other partes should forego some provision therein to which they may be entitled may be treated

by such other parties not in default as a rescission or abandonment of the entire contract. When one attempts arbitrarily to thrust upon another a different arrangement than that agreed upon, the other party is at liberty to treat the actual agreement as abandoned and sue the first party for damages resulting from a breach of the entire contract, because the real contract was repudiated by the first party. This is especially true if the refusal be to comply with a substantial provision or term of an existing agreement.

*Johnson Forge Co.* v. *Leonard,* 3 Pen. (Del.), 342 (51 Atl., 305).

*Michigan Yacht & Power Co.* v. *Busch,* 143 Fed., 929.

*National Machine & Tool Co.* v. *Standard Shoe Machine Co.,* 181 Mass., 275 (63 N. E., 900).

*Cresswell R. & G. Co.* v. *Martindale,* 63 Fed., 84 (C. C. A., 8th Cir.).

*L. Bucki & Son Lbr. Co.* v. *Atlantic Lumber Co,* 109 Fed., 411.

*Norrington* v. *Wright,* 115 U. S., 188.

*Filley* v. *Pope,* 115 U. S., 213.

*Providence Coal Co.* v. *Coxe et al.,* 19 R. I., 380 and 582 (35 Atl., 210).

*Pope et al.* v. *Porter et al,* 102 N. Y., 366.

*Mayor of Baltimore* v. *Schaub Bros.,* 96 Md., 534 (54 Atl., 106).

*Withers* v. *Reynolds,* 2 Barn. & Adol., 882.

Refusal on the part of the receivers and trustees to carry out the obligations of the Mount Carmel Coal Company under the existing arrangement would, in like manner, justify a rescission or termination of such

agreement by the other party upon general principles. As a matter of strict right the Railway Company was entitled to a termination of the entire agreement and certainly when the evidence was taken it was at least entitled to the alternative relief prayed for. A denial of all equitable relief by the bankruptcy court which was still withholding possession of the property covered by the contract could not be considered as consonant with principles of right or justice. The action of the bankruptcy court and its officers, the trustees, would leave the Railway Company entirely remediless and would give to general creditors of a bankrupt an advantage in respect to the execution of an executory contract and receiving the fruits thereunder greater than the bankrupt could have claimed.

To obviate any possible prejudice we may be pardoned in commenting upon a statement found in the opinion of the District Judge, which, though not a part of the record, might be read with some resulting misconception.

In the opinion of the District Judge it was suggested that receiver's notes or certificates had been issued creating a paramount lien on all the estate of the bankrupt, and that for such reason a superior equity would arise in favor of such parties holding the same as against the Railway Company. In the first place, it may be stated that the record did not show that any such certificates had been issued, or, if issued, the facts or circumstances under which they were issued. In the next place, if issued, they were not issued at the solicitation or with the connivance of the Railway Company, and it is difficult to understand upon

what principle its rights or equities could thereby be prejudiced. Again, it did not appear that the holders of such certificates were asserting any claims or rights in respect to this particular agreement or that the certificates were even issued upon the faith of the same. Certainly there was no defense interposed by the trustees upon any such ground. Further, it might be said, that as the District Judge found it necessary to go outside of the record to find a reason for his conclusion, that the receiver's notes or certificates have all since been satisfied and taken up by the trustees out of the profits realized from this agreement. Any such matter must, therefore, be eliminated from the consideration of this case. No point is made in appellant's brief based upon such statement in the District Judge's opinion. It is merely referred to here to obviate any prejudice.

## VIII.

THE RECEIVERS AND TRUSTEES AFTER BEING NOTIFIED BY THE INTERVENING PETITION OF THE VERBAL ARRANGEMENT AND VARIATION, BY CONTINUING TO ACCEPT THE BENEFITS OF THE WRITTEN AGREEMENT AND BY CONTINUING TO PERFORM THE SAME, MUST BE DEEMED TO HAVE ASSUMED THE ENTIRE ARRANGEMENT AS VARIED OR MODIFIED WITH ITS EXISTING BURDENS AND OBLIGATIONS, PARTICULARLY AFTER THE ARRANGEMENTS HAD BEEN SHOWN ON THE HEARING. IN ANY EVENT IT WAS INEQUITABLE IN THE COURT, AFTER ASCERTAINING THAT THE VERBAL ARRANGEMENTS IN FACT EXISTED, TO PERMIT ITS RECEIVERS OR TRUSTEES TO CONTINUE TO ENJOY THE BENEFITS OF THE AGREEMENT WITHOUT DISCHARGING THE BURDENS INCIDENT THERETO WHICH EXISTED AT THE DATE OF THE BANKRUPTCY. THE BANKRUPTCY COURT COULD NOT JUSTLY SEIZE OR HOLD THE CONTRACT AS PROPERTY OF THE BANKRUPT FOR THE BENEFIT OF ITS ESTATE WITHOUT DISCHARGING THE EQUITABLE CLAIMS IN FAVOR OF OTHER PARTIES THERETO UPON THE SAME.

It is stated in argument that the receivers of a court have a reasonable time in which to elect whether to assume or reject executory contracts of the insolvent and to make such election have a reasonable time to ascertain the burdens and benefits thereof, and cases of railroad receiverships are particularly referred to.

Such receiverships, we respectfully suggest, are to be differentiated from the case of receiverships of private individuals or purely private corporations. In the case of a railroad receivership where a line of railroad has

been operated as part of a system under a lease, public necessity requires the continued operation of such line and the court and its receivers in foreclosure proceedings are therefore allowed some latitude and time to ascertain whether the lease should be adopted or the premises covered thereby surrendered up. Duty to the public requires a continued operation of the railroad. Such public exigency applicable to the operation of *quasi public* highways can have no application in a case of the bankruptcy of private individuals or corporations and in respect to the assumption of the private agreements of the bankrupt. Other parties to such contracts have rights which should not be prejudiced. It is, however, quite plain that after a hearing was had before the referee, the receivers, and afterwards the trustees in bankruptcy, as well as the bankruptcy court itself, were fully advised of the existence and nature of the verbal arrangements in question; that the advancements had been made by the Railway Company and what was the understanding in respect to the same. They were fully advised of all the *facts*. It was then incumbent upon the bankruptcy court to promptly determine whether the lease and agreement should be assumed or rejected. Thereafter, certainly, by insisting upon taking the benefits of the arrangement they must have understood that they could only insist upon further performance of the executory contract in the condition and as it was at the time of the bankruptcy proceedings. That the court erred in respect to the legal rights to the parties was not our fault. Private parties cannot shield themselves from the legal effect of their acts on the plea that they mis-

conceived the law. Neither can trustees in bankruptcy acting for and representing the general creditors set up any such plea. By knowingly taking any benefit under the lease and agreement the receivers and trustees must be deemed to have assumed the same with its burdens for the benefit of the estate.

See *White* v. *Griffing*, 44 Conn., 437, 449 and 450, where it was held that an assignee in insolvency proceedings had assumed a lease of the insolvent.

In *Wiggins Ferry Co.* v. *O. & M. Ry. Co.*, 142 U. S., 397, it is stated on pages 408 and 409:

> "It is not necessary that a party should deliberately agree to be bound by the terms of a contract to which he is a stranger, if, having knowledge of such contract, he deliberately enters into relations with one of the parties which are only consistent with the adoption of such contract. If a person conduct himself in such manner as to lead the other party to believe that he has made a contract his own, and his acts are only explicable upon that theory, he will not be permitted afterwards to repudiate any of its obligations. 2 Pomeroy Eq. Juris., Sec. 965; *Chicago & Alton Railroad* v. *Chicago, etc., Coal Co.*, 79 Ill., 121. This principle is applicable here, and it results from this that, if the railway company or its receiver has been guilty of a breach of this contract, the petitioner is entitled to recover its damages, by reason of such breach, in this proceeding, unless it has in some way become estopped by the judgments of the state courts of Illinois, or by its own conduct and disclaimers in this suit."

In *Rock Island, etc., Railway* v. *Rio Grande Railroad*, 143 U. S., on pages 608 and 609, it was held that a stranger company was to be regarded as being substituted in the place of one of the parties thereto, and

entitled by reason thereof to performance from the other party. In the opinion it is said:

> "But under the circumstances of this case, a court of equity will treat the assignee in fact as the legal assignee, possessed of the rights *and charged with the obligations of the original party to the contract.*"

Had the receivers declined to assume the agreement and the bankrupt been unable to fully carry out and perform the same, then clearly the Railway Company was entitled to terminate the entire agreement and to prove all damages which would have resulted to it by reason of such breach of the entire agreement.

*In re Stern*, 116 Fed., 604.

It would be entitled to participate therefor in the bankrupt's estate and at the same time its obligations would be ended and the lessors would be entitled to the coal mines and leased premises. On the other hand, of course, if the receivers declined to assume the agreement, and the bankrupt had continued to perform thereunder, it could not continue to do so without recognizing the rights of the Railway Company which had attached by reason of its advances.

As the Railway Company has been deprived of these rights by reason of the arbitrary and unjust action of the receivers had under the protection of the court and the Railway Company was otherwise remediless, it is but equitable and just that the trustees in bankruptcy should be charged with the obligations of the bankrupt towards the Railway Company arising out of the verbal arrangements. It is but just that the estate of the bankrupt, for whose benefit the executory

contract of the bankrupt was taken and which has had the benefits resulting from the execution of the agreement, should be charged with the satisfaction of the obligations of the bankrupt by recognizing and allowing this claim as one which should be paid out of the assets before those of general creditors. It is a charge incurred in the administration of the bankrupt estate and therefore now entitled to preference over the claims of general creditors because it was so incurred if upon no other equitable grounds.

## IX.

AS THE TERM OF THE LEASE AND AGREEMENT HAD EXPIRED JUNE 1, 1906, PENDING THE APPEAL IN THE CIRCUIT COURT OF APPEALS AND BEFORE ARGUMENT THEREON, AND AS THROUGH THE WRONGFUL ACTION OF THE BANKRUPTCY COURT IN EXERCISING ITS POWER TO WITHHOLD POSSESSION, THE BANKRUPT ESTATE HAS HAD THE ENTIRE BENEFIT OF THE LEASE AND AGREEMENT AS ADMITTED ON SUCH ARGUMENT, AND AS THE CIRCUIT COURT OF APPEALS COULD NOT, THEREFORE, THEN DIRECT ALTERNATIVE RELIEF BY REQUIRING THE TRUSTEES TO SURRENDER UP THE LEASE AND AGREEMENT, IT WAS JUST AND EQUITABLE THAT SAID COURT SHOULD DIRECT THE ALLOWANCE OF THE CLAIM OF THE RAILWAY COMPANY AS A CHARGE UPON THE BANKRUPT ESTATE, IT APPEARING FROM THE EVIDENCE THAT THE RAILWAY COMPANY PAID EACH MONTH DURING THE CONTINUANCE OF THE AGREEMENT AN AMOUNT GREATER THAN THE AMOUNT OF ITS CLAIM IN QUESTION.

As stated heretofore it was expressly admitted in the brief filed by the trustees in the Circuit Court of Ap-

peals that the receivers and trustees of the bankrupt had continued its business until the expiration of the contracts of lease. There was no question that they had not had the benefit of the performance of the contract and, had the Circuit Court of Appeals been requested to make findings of fact as contemplated by the rules of this court, which, in connection with the pleadings would constitute the entire record on appeal here, sufficient findings to cover such matters would have been made as is apparent from the opinion of the Circuit Court of Appeals. Courts frequently act upon the admissions of parties before it and the Circuit Court of Appeals was justified in acting upon admissions made before it. There was no possible controversy in respect to the salient fact that the trustees had continued to operate under the written lease and agreement until the termination thereof. It is idle to claim that the Circuit Court of Appeals was not warranted in making its decree because the record before the referee of necessity would not show that the trustees had continued operations until the expiration of the lease. Such contention can hardly be regarded as made in good faith in view of the admissions made to the Circuit Court of Appeals. It certainly may be presumed that as the receivers had continued to operate under the agreement after the filing of the intervering petition and as the bankruptcy court had declined to give intervenors any relief, that the trustees had continued long enough in possession to be held to have assumed the agreement with its burden so as to charge the estate of the bankrupt. To hold otherwise would be to hold their continued possession as a wrong legal-

ized only by the arbitrary power of the bankruptcy court.

It was, moreover, expressly admitted on the hearing before the referee (Rec., 71) that the receivers had been delivering coal to the railway company of from $50,000 to $75,000 a month and of course would have had the benefit of such amounts derived from the lease and agreement; so that to the extent they had assumed up to the hearing if not later they had derived ample benefit to require them to discharge the claim of the railway company.

Of course, the railway company is not to be prejudiced by the erroneous rulings of the bankruptcy court, but the bankrupt estate (which was being administered for the benefit of general creditors who were invoking the powers of that court, and which estate has derived benefits therefrom to which it was not justly entitled and which has received the fruits of the contract), should in justice be called upon to respond and make restitution. Upon equitable principles the only relief which could be afforded by the Circuit Court of Appeals was to require the trustees in bankruptcy in their settlements with the railway company to recognize the outstanding obligations of the Mount Carmel Coal Company and to give credit to the railway company for the amount of the advances made by it upon what would otherwise be due for the coal furnished it by the receivers, and trustees since the bankruptcy proceedings were instituted, or the amount of the advances of the railway company should be made a charge upon the bankrupt estate as that estate has

had the benefit of the entire agreement. The trustees should be required to refund out of such estate the amount of such advances and to discharge the obligations or equities which had attached to the agreement in favor of the railway company, the benefits of which agreement the bankrupt estate was not entitled to receive until such obligations had been discharged.

We suggested in our brief filed before the argument in the Circuit Court of Appeals, that if that court was uncertain as to the whether the trustees in bankruptcy had continued to operate under the lease and agreement, and had taken its benefits for the remainder of the term, it might direct a further inquiry to be made in that particular and give directions as to the adjustment of accounts as was done in the case of *Erie Railroad Co.* v. *Dial*, 140 Fed., 689, 691 and 692. The unqualified admissions made in the brief of the trustees and in the argument, however, rendered such inquiry wholly unnecessary and justified in all particulars the decree of the Court of Appeals.

The power of an appellate tribunal to give appropriate directions under the circumstances is unquestioned.

Encl. of Pl. & Pr., Vol. 1, page 488.

*Estho* v. *Lear*, 7 Peters, 130.

*Crockett* v. *Lee*, 7 Wheat., 522.

*The Divina Pastora*, 4 Wheat., 52.

*Wiggins Ferry Co.* v. *O. & M. R. Co.*, 142 U. S., 396, 413, 414, 415 and 416.

*Union Central Life Ins. Co.* v. *Phillips*, 41 C. C. A., 272.

*Hubbard* v. *Manhattan Trust Co.*, 30 C. C. A., 520, 526.

Thus in Elliott on Appellate Procedure, Section 21, it is said:

> "The general authority to review and revise necessarily includes the right to enforce the law and administer justice. In the exercise of this authority an appellate tribunal may so mold its judgment as to secure the proper relief to the parties entitled to it. The fact that a question may be presented in a particular mode does not always restrict an appellate court to a particular course; for it may, upon an inspection of the whole record, pronounce such a judgment as will secure justice to the parties. *It is inconceivable that a high court of justice, such as an appellate tribunal, may not upon an investigation of the record, so frame its judgment as to prevent the defeat of justice by technical and arbitrary rules. The denial of this right involves the affirmation that the highest courts can not award justice, and this conclusion can not be vindicated, since the underlying and sovereign principle is that the right of appeal insures the litigants who have obeyed the substantive rules of law and conformed to the rules of procedure a judgment awarding them justice under the laws of the land. It must be true, therefore, that a high appellate tribunal may deliver and enforce a judgment that will prevent wrong and award justice to the parties entitled to it.*"

It is also well settled that if during the progress of a suit asking for equitable relief owing to a change in the situation of the parties or of the conditions of the subject-matters involved, purely equitable relief cannot be granted, the court still retains jurisdiction over the controversy and grants in lieu thereof pecuniary compensation in damages. This is illustrated in cases of specific performance, where, owing either to the default of the defendant or for any other reason, it be-

comes impossible to grant the equitable remedy, the court will retain jurisdiction of the suit and award pecuniary compensation in lieu of equitable relief.

See:

*Nelson* v. *Bridges*, 2 Beavan, 239.
*Cathcart* v. *Robinson*, 5 Peters, 264.
*Taylor* v. *Merchants Fire Ins. Co. of Baltimore*, 9 Howard, 390, 403.
Pomeroy's Eq. Jurisprudence, 3rd Ed., Vol. 1, Sec. 237, pages 341, 342.
*Morse* v. *Elmendorf*, 11 Paige, 277.
*Wiswall* v. *McGowan*, 2 Barb., 270, 281.
*Andrews* v. *Brown*, 3 Cush., 130.
*Milkman* v. *Ordway*, 106 Mass., 232.
*Martin* v. *Martin*, 24 Pac., 418.

To hold that the Circuit Court of Appeals had no power to direct the granting of relief appropriate to the premises and in view of the changed condition of the subject-matter of litigation and had no power to grant appropriate relief on account of the wrong done through the erroneous action of the bankruptcy court and due to the wrongful action of that court in withholding possession of property involved, when such court of appeals is given ample power under the bankruptcy law of supervision, and by appeal to correct the errors of the bankruptcy court committed in the administration of the bankruptcy proceedings, would be, indeed, a reflection upon the administration of justice. Can it be possible that a court charged with the equitable administration of an estate may commit error to the prejudice of innocent parties and not be obligated to make amends out of such estate?

Can it seize and hold property for administration in any judicial proceedings to the detriment of the rights therein of parties who did not initiate such proceedings but were strangers thereto?

We respectfully submit that the views adopted by the English Court of Appeals *In re Tyler, Official Receiver Ex parte*, King's Bench Division (1907), Volume 1, on pages 869 and 870, heretofore quoted by us, are more in consonance with the administration of justice, and with the first principle laid down in ~~Justiman's~~ Justinian Code:—

> "Justice is the set and constant purpose which gives to every man his due." * * * "The precepts of the law are these: to live honestly, to injure no one, and to give every man his due."

The Appellate Court had ample power to direct the lower court to rectify the wrong and see that justice was done.

The appeal should be dismissed or the decree of the Circuit Court of Appeals should be affirmed.

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WM. R. SMITH,
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GARDINER LATHROP,
*Counsel.*

FILED.
SEP 24 1908
JAMES H. McKENNEY,
Clerk

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

No. 95

J. E. HURLEY, CYRUS LELAND, Jr., and WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Bankrupt,
*Appellants,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COAL COMPANY and CHEROKEE AND PITTSBURG COAL & MINING COMPANY,
*Appellees.*

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## MOTION TO DISMISS APPEAL AND BRIEF FOR APPELLEES ON SAME.

GARDINER LATHROP,
ROBERT DUNLAP,
*Attorneys for Appellees.*

Chicago, September 10, 1908.

GUNTHORP-WARREN PRINTING CO., CHICAGO

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*Appellees.*

APPEAL FROM UNITED STATES CIRCUIT COURT FOR THE EIGHTH CIRCUIT.

## MOTION TO DISMISS APPEAL.

Come now the above appellees and respectfully move the court to dismiss the above appeal upon the following grounds:—

1. The appellants have failed to comply with Clause 3 of General Order in Bankruptcy XXXVI, said appeal being had from a decree of the Circuit Court of

Appeals for the Eighth Circuit allowing a claim in favor of The Atchison, Topeka and Santa Fe Railway Company and directing its payment in full out of the assets of the bankrupt estate, and the said Circuit Court of Appeals did not, at or before the time of entering its decree, make and file a finding of the facts and its conclusions of law thereon, stated separately or otherwise.

2. That the case was not appealable to this court from said Circuit Court of Appeals, and this court is without jurisdiction in the premises.

GARDINER LATHROP,
ROBERT DUNLAP,
*Attorneys for Appellees.*

IN THE

# Supreme Court of the United States.

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*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COAL COMPANY and CHEROKEE AND PITTSBURG COAL & MINING COMPANY,

*Appellees.*

## BRIEF FOR APPELLEES ON MOTION TO DISMISS APPEAL.

### STATEMENT.

The above case is an appeal from a decree of the Circuit Court of Appeals for the Eighth Circuit reversing a decree of the District Court of the United States for the District of Kansas sitting in Bankruptcy, dismissing an intervening petition of appellees, and in which said District Court was directed to allow a claim in favor of the Railway Company as preferential.

On October 1, 1896, appellees entered into a so-called lease and agreement with one Charles J. Devlin, found on record pages 37 to 57, inclusive. By consent of the parties, this so-called lease and agreement was assigned by Devlin to the Mount Carmel Coal Company and afterwards by two subsequent agreements was extended in effect until June 1, 1906. On July 7, 1905, receivers in bankruptcy for the property of the Mount Carmel Coal Company were appointed, and that company was subsequently adjudicated a bankrupt, and the receivers were duly elected trustees in bankruptcy. This lease and agreement was the principal asset of the bankrupt. (Record, page 11.) Under the terms of the lease and agreement, the Osage Carbon Company gave the lessee the right to mine and extract coal from certain lands in Osage County, Kansas, and the Cherokee and Pittsburg Coal & Mining Company gave it similar rights for the same period in respect to lands in Crawford County, Kansas. Among other things the lessee agreed to pay certain rentals, and royalties on the coal mined, and to do certain other things as in the agreement specified in regard to opening and developing coal mines. In the 22nd article of this agreement (Record, pages 51, 52) the lessee was obligated to sell and deliver to The Atchison, Topeka and Santa Fe Railway Company of coal so mined all the coal required by it in the operation of its lines of railway in Kansas as far west as Newton, etc., at the prices fixed in said agreement, which were to be varied or adjusted according to certain conditions therein specified, in respect to wages paid miners. (See record, page 53.) The Railway Company was to pay the lessee on or before the 15th day of each month

for all coal delivered during the preceding calendar month according to the prices in the agreement stated. (Record, page 53.) In the 17th article (Record, page 49) provision was made by which the Coal Companies (the lessors) or the Railway Company might terminate the agreement for failure of the lessee to perform any of its obligations, covenants or agreements, if within thirty days after written notice of such failure and the nature thereof it did not cure such failure by performance satisfactory to the Railway Company or the lessors. In article 28 it was provided that neither the lease and agreement nor any interest therein should be assigned by the lessee without the consent of the lessors and the Railway Company given in writing by their respective Presidents. (Record, page 55.) In this connection it may be stated that the lessor Coal Companies were controlled by the Railway Company, and one of the main purposes of the so-called lease and agreement was to secure to the Railway Company an adequate supply of coal needed by it for the operation of its railways.

It further appeared that for some time prior to the bankruptcy proceedings the Mount Carmel Coal Company frequently requested the Railway Company to make advances on account of coal to be delivered under the contract in order to enable the Mount Carmel Coal Company to pay the wages of miners and continue its operations. Such advances would be made by the Railway Company and when vouchers would be presented by the Coal Company for coal subsequently furnished under the agreement, due credit would be given thereon for the advances so made by the Railway Company, and the vouchers duly receipted, the Railway Company

being allowed a discount in the nature of interest upon these advances until the same was duly credited upon vouchers for coal subsequently delivered under the agreement. This arrangement was verbal in its nature, made from time to time, and was one by which in substance the Railway Company, instead of waiting until coal had been delivered in each month and paying therefor upon the 15th day of the following month, paid in advance for the coal which the Mount Carmel Coal Company was obligated to furnish the Railway Company under the terms of the agreement. Before the institution of bankruptcy proceedings the Railway Company had advanced to the Mount Carmel Coal Company on account of coal to be furnished under the agreement about $57,304.16. The receivers in bankruptcy on July 7, 1905, took possession of the coal mines and proceeded to operate under the so-called lease and agreement by direction of the court. The Railway Company thereupon demanded of said receivers in bankruptcy that in furnishing coal under the lease and agreement and in carrying out the same, they should give it due credit for advancements theretofore made by it to the bankrupt as prepayments for coal which the lessee and its assignee would be obligated to furnish to the Railway Company while such receivers were seeking to obtain the benefits of the lease and agreement in question. The receivers in bankruptcy refused to recognize the claim of the Railway Company or the obligation of the bankrupt under the pre-existing arrangement between the bankrupt and the Railway Company. Thereupon the Railway Company and the Coal Companies, the lessors, filed in the bankruptcy proceedings, an intervening petition set-

ting up the oral arrangement between the Railway Company and the bankrupt and the amount of prepayments made by the Railway Company to the Mount Carmel Coal Company for coal to be furnished under the lease and agreement, and asked the court to direct the receivers to allow or satisfy the claim of the Railway Company for such advances or to surrender possession of the lands and properties covered by the lease and agreement upon payment to the receivers of the amount provided to be paid to the Mount Carmel Coal Company under the terms of said lease and contracts. (See record, pages 33 to 35.) In substance, as stated, the intervening petition in effect asked either that the receivers satisfy the demands of the Railway Company arising out of the modification of the written contract made with the Mount Carmel Coal Company in respect to the mode of performance so far as such modification was had prior to the bankruptcy proceedings, and the benefits of which contract were being appropriated by the receivers, and which demand was an equitable charge against the lease and agreement in favor of the Railway Company, or that the receivers be directed to surrender up such lease and agreement if they did not choose to adopt the same with the equities against the same in favor of the Railway Company. A general demurrer filed to this intervening petition was afterwards withdrawn and the receivers, and afterwards the trustees, who were substituted as parties, filed an amended answer setting up, first, a general denial of the averments in the intervening petition; second, a denial that the verbal contract set forth in the petition was a modification of the written lease or contracts, but alleged that *if* made at all it was an en-

tirely independent contract; and, third, that the verbal contract, as a modification of the written contracts would be within the Statute of Frauds of the State of Kansas and void. (Record, page 72.)

The matter was heard before the Referee in Bankruptcy on January 13, 1906. (Record, page 72.) He found, among other things, that the advances were made by the Railway Company to enable the Mount Carmel Coal Company to meet its pay rolls and were to be met by a delivery of coal under the terms of the lease. (Record, page 25.) He stated he was unable, however, to find testimony to modify the written lease, that there was no *express* oral agreement to that effect. He stated, however, that it was true that the advances were to be paid by money due the Coal Company (lessee) for coal furnished the Railway Company, and that the money, instead of being paid under the terms of the written contract, would be kept to reimburse the Railway Company for money advanced. He then continued (Record, page 31): *"But this amounts to the same thing as saying that the Santa Fe Company merely paid for its coal in advance, although not required to do so by the terms of the contract."* (Record, page 31.) He thereupon made an order dismissing the intervening petiton as without equity. This order was affirmed by the District Court.

The referee, in other words, seemed to think that there was no express modification of the written lease and agreement because the parties had not, in set terms or language, expressed an intention to effectuate such a result. The referee and the lower court treated the various verbal transactions covering advancements

made as being separate and independent agreements in no wise connected with the written lease and agreement. In this they both overlooked or ignored an obvious fact which would be apparent to anyone who would put himself in the place of the contracting parties,—the important fact, that there was then in effect a contract by which the Mount Carmel Coal Company was obligated under its terms to furnish the Railway Company with its coal at prices stated or determined therein, that the Railway Company, in view of those existing obligations, instead of waiting to make its payments or perform its part of the contract upon the 15th day following each month, at the express request in each instance of the Mount Carmel Coal Company, made, as found by the referee, its payments in advance and thereby performed its part of the undertaking in the particular instances specified at a date prior to the time it was legally required so to do. To this extent and in these respects it is quite obvious that the strict manner of performance by the respective parties of some of the terms of the written contract was modified and to the extent that the Railway Company, at the request of the Mount Carmel Coal Company, performed in advance of the time it was required to under the strict terms of the agreement, to that extent, by the agreement of the parties and in those particulars, the written agreement was modified, and such modification was binding upon the receivers and trustees in bankruptcy as assignees of the Mount Carmel Coal Company. They could not lawfully appropriate to themselves the benefits of the agreement without at the same time assuming and discharging the burdens and

equities which had attached in favor of the other parties.

The receivers and trustees in bankruptcy and the bankruptcy court were, therefore, at an early stage, advised of the burdens which had attached to this contract in favor of the Railway Company, and it would be inequitable for the bankruptcy court to permit its receivers or trustees to continue to operate under the written lease and agreement and take the benefits thereof without discharging the equities or burdens which had attached thereto in favor of one of the other parties to such lease and agreement.

When the case was heard and argued in the Circuit Court of Appeals, which was after June 30, 1906, it appeared that the term of the lease and agreement had pending this appeal expired, that in the meantime the receivers and trustees in bankruptcy had obtained the full benefit of such lease and agreement. This was admitted by the attorney for the trustees during the argument in the Circuit Court of Appeals. The Circuit Court of Appeals concluded that the bankruptcy court should have sustained the intervenors' petition and surrendered to them the leased premises, or required the trustees, upon the assumption of the lease and agreement, to perform the condition of mining and furnishing the Railway Company sufficient coal to cover its advances; that not having done so and the lease having expired so that it could not then be directed by the court, the assets of the estate consisting in part of money received for coal delivered to the Railway Company, the court held, should be subjected to the payment of such advances as a preferential claim. The

decree of the bankruptcy court was thereupon reversed and the cause remanded with instructions to proceed according to the opinion of the Circuit Court of Appeals. (Record, page 129.)

An appeal to this court was allowed by one of the judges of the Circuit Court of Appeals, but no findings of fact or conclusions of law were made or filed in that court.

## ARGUMENT.

### I.

THE APPEAL SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH CLAUSE 3 OF GENERAL ORDER IN BANKRUPTCY XXXVI MADE BY THIS COURT.

The appeal in question is taken from the final decision of the Circuit Court of Appeals for the Eighth Circuit allowing the claim of The Atchison, Topeka and Santa Fe Railway Company, directing its payment as a preferential claim out of the bankrupt estate. The intervening petition set up a claim in the bankruptcy proceedings in favor of the Railway Company. (*Lea* v. *Hinsley,* L. R. (1904), 2 Ch. Div., 57.)

Section 25b of the bankruptcy law provides, among other things, as follows:

> "From any final decision of a Court of Appeals allowing or rejecting a claim under this act, an appeal may be had under such rules within such time as may be prescribed by the Supreme Court of the United States in the following cases and no other:
>
> 1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States; or
>
> 2. Where some justice of the Supreme Court of the United States shall certify that, in his opinion, the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

No certificate was made by any justice of this court as required by the second clause above mentioned.

In order to expedite the settlement of bankrupt estates and the determination of claims in respect thereto, this court, under the authority of the above provision, provided in the second clause of General Order in Bankruptcy XXXVI that appeals to this court from the Circuit Court of Appeals or from any court of bankruptcy shall be taken within thirty days after the judgment or decree, and such provision has all the effect of a statutory provision.

*Conboy* v. *First National Bank of Jersey City*, 203 U. S., 141, 144.

In the third paragraph of the above General Order it is provided:

> "In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts and its conclusions of law thereon, stated separately, and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree and the finding of facts and the conclusions of law."

The Circuit Court of Appeals was not requested to make any findings of fact or conclusions of law. The appeal is general, the entire record being sent up. The omission to make such findings of fact cannot be supplied by reference to the opinion of the Circuit Court of Appeals. In *Chapman* v. *Bowen*, 207 U. S., page 91, it was said, with reference to a failure to comply with Clause 3 of the above General Order:

> "No such finding of facts and conclusions of law was made in this case, nor was the court requested to make such finding. The appeal was a general appeal and the entire record was sent up. The omission cannot be supplied by reference to the opinion, as is attempted in the argument. *British Queen Mining Co.* v. *Baker Silver Mining Co.*, 139 U. S., 222, and cases cited; *Lehnen* v. *Dickson*, 148 U. S., 71, 74."

The above provision of the General Order is similar to the statutory provision governing appeals from a Territorial supreme court to this court in cases tried without a jury. The making of appropriate findings of fact and conclusions of law by the court from which the appeal is taken is a pre-requisite to the jurisdiction of this court.

*Gray* v. *Howe*, 108 U. S., 12.

*Salina Stock Co.* v. *Salina Creek Co.*, 163 U. S., 117, 118.

*United States Trust Co.* v. *New Mexico*, 183 U. S., 540.

For the above reasons the appeal should be dismissed.

## II.

THE CASE IS NOT APPEALABLE TO THIS COURT AS THE QUESTION INVOLVED IS NOT ONE WHICH MIGHT HAVE BEEN TAKEN ON APPEAL FROM THE HIGHEST COURT OF A STATE TO THIS COURT.

Under Section 25b, subdivision 1, of the Bankruptcy Act, the case is not appealable to this court unless it appears that the question involved is one which might

have been taken on appeal or writ of error from the highest court of a state to this court.

Section 709 of the United States Revised Statutes governing appeals from the highest court of a state to this court permits the same from a final judgment or decree where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision is against their validity, or where is drawn in question the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of their validity, or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority.

In the intervening proceedings there was not drawn in question the validity of any statute of the United States or of any authority exercised under it, and in which the decision was against such validity, nor did such proceedings involve any right, title, privilege or immunity claimed under the Constitution or under any statute of or commission held or authority exercised under the United States and in which the decision was against such title, right, privilege or immunity "specially set up or claimed" by the trustees in bankruptcy.

*Chapman* v. *Bowen,* 207 U. S., 89.

The case was decided upon general equitable principles, and although the bankruptcy law was incidentally considered, yet no right, privilege, or immunity in favor of the trustees in bankruptcy was specially set up by and decided against them.

*De Lamar's Nevada G. M. Co.* v. *Nesbitt,* 177 U. S., 523.

*Leyson* v. *Davis,* 170 U. S., 37.

There was no right, title or privilege of the trustees in bankruptcy under any federal statute or authority which was specially set up or claimed by them in these proceedings and the decision of which was against any such claim.

*Oxley Stave Co.* v. *Butler County,* 166 U. S., 648.

*Mutual Life Insurance Co.* v. *McGrew,* 188 U. S., 291, 308, 309.

*Capital Bank* v. *Cadiz Bank,* 172 U. S., 426.

*Bausman* v. *Dixon,* 173 U. S., 113.

Therefore, also, as no appeal lies from the final decision of the Circuit Court of Appeals allowing the claim of the Railway Company in question, this appeal should be dismissed upon either ground.

Respectfully submitted.

GARDINER LATHROP,
ROBERT DUNLAP,
*Attorneys for Appellees.*

# HURLEY, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF THE MOUNT CARMEL COAL COMPANY, BANKRUPT, APPELLANTS, *v.* THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 95. Argued January 26, 27, 1909.—Decided April 5, 1909.

*Coder* v. *Arts*, *post*, p. 223, followed as to the jurisdiction of this court of appeals from the Circuit Court of Appeals in bankruptcy proceedings, where the amount in controversy exceeds $2,000 and the question involved is one which might have been taken on writ of error from the highest court of a State to this court.

Equity looks at substance and not at form. An advance payment for coal yet to be mined may be a pledge on the coal and, in that event, as in this case, the trustee in bankruptcy takes the mine subject to the obligation to deliver the coal as mined to the extent of the advancement.

153 Fed. Rep. 503, affirmed.

THERE is practically no controversy in respect to the facts in this case. We take the following statement from the opinion of the Circuit Court of Appeals: In 1896 the Osage Carbon Company and the Cherokee and Pittsburg Coal and Mining Company, as parties of the first part, and Charles J. Devlin, as party of the second part, and the railway company as party of the third part, entered into an agreement whereby the parties of the first part leased to Devlin for a term of three years certain coal lands located in the State of Kansas, with the right to mine coal therefrom, and Delvin, the party of the second part, agreed

to sell and deliver to the railway company, and the latter to buy from him daily, all the coal required by it in the operation of certain of its lines of railroad in the State of Kansas at prices stated in the lease, payment to be made by the railway company on the 15th day of each month for all coal delivered to it during the preceding calendar month. Power was conferred upon the railway company to terminate the lease for failure by Devlin to perform any of his undertakings, and the right to assign the lease was made, subject to the consent of the railway company. Subsequently, Devlin duly assigned to the Mount Carmel Coal Company all his rights under the lease. By two successive agreements this contract was extended until June, 1906. All the parties continued in the performance of their respective obligations until July, 1905, when the Mount Carmel Company was adjudicated a bankrupt. Receivers were appointed and authorized to conduct the business of the bankrupt in the usual course until trustees should be chosen. The receivers and the subsequently appointed trustees successively continued to operate the mines under the orders of the court and to deliver the coal as required by the contract. While the receivers were in charge the railway company and the two coal companies, the original lessors, filed their joint intervening petition, setting forth their relations to the bankrupt under the contract, their rights thereunder, as already stated, and, in substance, that by an agreement between them and the bankrupt the contract had been modified to the extent that the railway company had agreed that without waiting until the 15th day of the month to make its payment for coal theretofore purchased, it would, in order to accommodate the Mount Carmel Coal Company and enable it to pay off laborers and keep the mines going, make advance payments from time to time when necessary for those purposes. In pursuance of that agreement and for the purposes stated it had advanced $57,304.16, with the understanding that it should be repaid by the subsequent delivery of coal; that the intervening bankruptcy proceedings of July 7 and the appointment of receivers by the

court alone prevented the bankrupt from carrying out its agreement and delivering the coal as required by the contract. The petitioners prayed that the lease be declared forfeited and void and the mines delivered back to them, or that the receivers be directed to deliver to the railway company the amount of coal so paid for in advance.

A referee, to whom the intervening petition was referred, reported unfavorably to the granting of any relief. His report was afterwards confirmed by the District Court and the petition dismissed. The referee found and reported that the amount claimed by the railway company was as stated in the intervening petition, and was advanced to enable the bankrupt to meet its pay rolls, but found that there was no testimony indicating an intention to modify the written lease. The District Court, in reviewing the action of the referee, said: "True, at the time the sums of money were advanced it was no doubt contemplated and agreed by the parties that the bankrupt would repay the money by furnishing the coal at the price of the coal measured in money by the terms of the contract and would furnish such coal in July and August, as claimed, but at the time of the failure of the bankrupt the coal remained in the ground unmined." Both the referee and the District Court found that the agreement for the advance of the money was a separate, independent, parol contract, and had nothing to do with the original written contract as shown by the lease, and that, being such an independent, parol contract, there was no lien upon any of the property for its payment.

The Circuit Court of Appeals, 82 C. C. A. 453, reversed the judgment of the District Court and held that that court should have directed a surrender of the leased premises or required the trustees, upon assumption of the lease, to mine and deliver to the railway company sufficient coal to cover its advances; and it further held that the lease having expired, the assets of the estate, consisting in part of the money received for coal delivered to the railway company, should be subject to the payment of such debt as a preferential claim.

*Mr. Frank Hagerman*, with whom *Mr. John S. Dean* was on the brief, for appellants:

Inasmuch as the fund out of which the advances were to be repaid remained in the bankrupt's custody, no equitable assignment was made, or equitable charge created, hence upon no theory could the intervenors prevail.

The pleadings, evidence, referee's report, finding of the trial judge and opinion of the Circuit Court of Appeals all show that the alleged payment was expected to be made from a fund in the custody of the debtor.

There was no assignment if the payment was to be from fund in hands of the debtor. *Christmas* v. *Russell*, 14 Wall. 69, 84; *Dillon* v. *Barnard*, 21 Wall. 430, 440; *Meyer* v. *Delaware R. R. Construction Co.*, 100 U. S. 457, 477; *Ex parte Tremont Nail Co.*, 24 Fed. Cas. 183, 184; *Putnam Savings Bank* v. *Beal*, 54 Fed. Rep. 579; *Badgerow* v. *Manhattan Co.*, 74 Fed. Rep. 926; *Commercial Bank* v. *Rufe*, 92 Fed. Rep. 795; *Hale* v. *Dressen*, 76 Minnesota, 183; *Hicks* v. *Roanoke Brick Co.*, 94 Virginia, 746; *Hossack* v. *Graham*, 20 Washington, 192; *Silent Friend Mining Co.* v. *Abbott*, 7 Colo. App. 73.

Bankruptcy gave no higher right to the intervenors. There was no equitable assignment even if a solemn contract had been made by the debtor to pay for advances out of coal to be by it mined in the future. Had there been no bankruptcy, the alleged agreement would have created only a general debt enforcible at law. *Ex parte Tremont Nail Co.*, Fed. Cas. No. 14,168; *Silent Friend Mining Co.* v. *Abbott*, 7 Colo. App. 73.

However, had there been a modification of the contract exactly as alleged, written out and attached to the original contract, there could have been no cancellation of the lease. There having been no reservation of the right of reëntry for a breach of the modified agreement, there was no right to a surrender of the property, which was the only relief sought. 18 A. & E. Enc. of L. (2d ed.), 369; *Hague* v. *Ahrens*, 53 Fed. Rep. 58, 60.

To like effect are: *In re Pennewell*, 119 Fed. Rep. 1391; *Doe*

v. *Godwin*, 4 Maule & S. 265; *Crawley* v. *Price*, L. R. 10 Q. B. 302; *Den* v. *Post*, 25 N. Y. Law, 285; *Spear* v. *Fuller*, 8 N. H. 174; *Wheeler* v. *Dascombe*, 3 Cush. 285; 1 Washb. Real Prop., § 504.

*Mr. Robert Dunlap*, with whom *Mr. Wm. H. Smith* and *Mr. Gardiner Lathrop* were on the brief, for appellees:

By advancing or prepaying, at the request of the bankrupt, for coal which that company was obliged to furnish under the written lease and agreement, that company and the railway company to that extent and in that particular varied or modified the mode of performance required of the railway company by the written contract and modified or varied its terms so far as applicable to coal so paid for in advance. That, as contracting parties, they had the lawful right to do, and strangers to the contract are in no position to question what was done. 1 Parsons on Contracts (9th ed.), star pages 4 and 5; *Youngberg* v. *Lamberton*, 91 Minnesota, 100; *Bryant, Adm.*, v. *Stephens* 58 Alabama, 636; *Holman & Woods* v. *The Georgia R. R.*, 67 Georgia, 595; *Cline* v. *Shell*, 43 Oregon, 372; *Hull* v. *Pitrat*, 45 Fed. Rep. 94; *Insurance Co.* v. *Hinesley*, 75 Indiana, 1; *Prudential Ins. Co.* v. *Sullivan*, 27 Ind. App. 30.

The testimony shows that the transactions between the railway company and the coal company were understood and intended by the parties as a variation or modification in the mode of performance of the written stipulations in the agreement to the extent that the advances were made by the railway company. Such advances were not made on the general credit of the coal company, but in view of and upon the strength of its contract obligation to furnish the railway company with coal under the written agreement.

This arrangement was made in view of the contractual relations between the parties, as evidenced by the written contract, and it must be assumed that the advances were made on the faith of and in reliance upon the contract obligation of the Mount Carmel Company to furnish coal. *Carr* v. *Hamilton*,

129 U. S. 252; *Fourth St. Bank* v. *Yardley*, 165 U. S. 634; *Jennings* v. *Bank*, 79 California, 323; *Stellings* v. *Jones Lumber Co.*, 116 Fed. Rep. 261, 266, 267.

The trustee in bankruptcy, in assuming to take the benefits under or to carry out the lease and agreement of the coal company, stood in the same plight as that company in respect to such contract, and could only assume it or take the benefits thereunder subject to all adjustments theretofore made and to all equities in favor of all the other parties to such agreement and in the exact condition in which such contract was at the date of the adjudication in bankruptcy. *York Mfg. Co.* v. *Cassell*, 201 U. S. 344; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Stewart* v. *Platt*, 101 U. S. 731; *Yeatman* v. *Savings Institution*, 95 U. S. 764; *Thompson* v. *Fairbanks*, 196 U. S. 526; *Hauselt* v. *Harrison*, 105 U. S. 401; *Winsor* v. *McLellan*, 2 Story, 492 (Fed. Cas. No. 17,887); *Winsor* v. *Kendall*, 3 Story 507 (Fed. Cas. No. 17,886); *Ex parte Newhall*, 2 Story, 360 (Fed. Cas. No. 10,159).

Mr. Justice Brewer, after making the foregoing statement, delivered the opinion of the court.

We shall not stop to discuss the question of jurisdiction. That whole subject has been so fully considered in the case just decided of *Coder, Trustee, etc.*, v. *Arts, post*, p. 223, that any further discussion of the subject would be superfluous.

We pass directly to the merits, and in order to a clear understanding of them the facts of the dealings between the coal company and the railway company must be borne in mind. The railway company entered into its original contract for the sake of securing the constant supply of coal necessary for the operation of part of its railway. It was to take from the coal company daily all the coal required therefor at prices fixed in the contract, and to make payment therefor on the fifteenth day of each month for all coal delivered to it during the preceding calendar month. It was not engaged in the business of money

lending. Its entire arrangement was for the purpose of securing daily its needed coal, and that was fully understood by all the parties. After a while the coal company became embarrassed, found difficulty in securing money for the payment of its employés, whereupon and in order to prevent any delay on the part of the coal company or any embarrassment which it, the railway company, might suffer from failing to receive from the coal company the needed amount of coal it advanced money to the coal company to enable it to pay its employés, and thus to continue the performance of its obligation to mine and deliver the coal. The railway company was simply paying in advance instead of waiting until the fifteenth day of the succeeding month, and the money by it loaned was not loaned as an independent transaction—such as would be made by an ordinary money lender—but an advancement made in anticipation of the delivery of the coal. To ignore this element and make the bankruptcy proceedings operate to discharge this obligation of the coal company, and leave the transaction as one of an independent loan of money to the coal company would result in destroying the full equitable obligations of the coal company, and place the parties in their relations to each other on an entirely different basis from what had been contemplated by them when they entered into this original arrangement. While decisions directly in point may not be found, yet see *Ketchum* v. *St. Louis*, 101 U. S. 306–317; *Hauselt* v. *Harrison*, 105 U. S. 401; *Carr* v. *Hamilton*, 129 U. S. 252; *Fourth Street Bank* v. *Yardley*, 165 U. S. 634. In *In re Chase*, 59 C. C. A. 629, 631, Circuit Judge Putnam, delivering the opinion of the Circuit Court of Appeals of the First Circuit, says:

"It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant. Williams' Law of Bankruptcy (7th ed.), 191. Indeed, bankruptcy proceeds on equitable principles so

broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

In *Thompson* v. *Fairbanks*, 196 U. S. 516, 526, this court said:

"Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act."

The purpose of the parties is very clearly expressed in the following quotation from the opinion of the Court of Appeals:

"It appears that the coal company, while the contract was still in force and being executed, became embarrassed and unable to meet its pay rolls; as a result it might not be able to mine or deliver the coal which it had agreed to mine and deliver to the railway company, and which the latter imperatively required for its daily consumption. In this state of things the railway company agreed to waive its right to withhold payment for fifteen days after the coal was delivered to it and pay for some of it before it was delivered; and the coal company agreed, as found by the trial court, to repay such advances, not in money, but by furnishing coal in the months of July and August following, at the price fixed by the original contract. This arrangement, made when the coal company was in embarrassed circumstances, and obviously inspired by the necessity of meeting the pay rolls, and for the ultimate purpose of securing performance of the only part of the original contract in which the railway company was interested, namely, securing its supply of coal, is so intimately and vitally related to the original contract that we are unable to agree with the trial court that it was intended to be independent and separate from it. It was not, in our opinion, a modification of any of the substantive

provisions of the contract, but was a change rendered necessary by subsequent events in the method of its execution only. It was an arrangement in no manner inconsistent with any of the provisions of the original contract, but only in aid of its execution.

"The contract after the new arrangement remained as before. The coal company still had a right to mine coal on the same terms and conditions as before and was bound to supply the daily needs of the railway company as before. The money paid in advance entitled the railway company to an amount of coal which the money so advanced would pay for according to the terms of the original contract. We think the inevitable meaning of the new arrangement, interpreted in the light of the conditions surrounding the parties and as necessarily intended by them, was to pledge a sufficient amount of coal after it should be mined as security for the payment of advances made. This result is not expressed in the conventional form of a mortgage or pledge, but the method of producing it was devised for the purpose of acquiring the needed money by the coal company and of furnishing security for its repayment. If the parties intended the arrangement to be one for borrowing and securing the repayment of money, we ought, as between them, to so regard it and treat it as creating an equitable charge or lien, however inartificially it may have been expressed."

We fully approve of this interpretation of the transaction. Equity looks at the substance and not at the form. That the coal for which this money was advanced was not yet mined, but remained in the ground to be mined and delivered from day to day as required, does not change the transaction into one of an ordinary independent loan on the credit of the coal company or upon express mortgage security. It implies a purpose that the coal as mined should be delivered, and is from an equitable standpoint to be considered as a pledge of the unmined coal to the extent of the advancement. The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings. All obligations of a legal and equitable nature

remained undisturbed thereby. If there had been no bankruptcy proceedings the coal as mined was, according to the understanding of the parties, to be delivered as already paid for by the advancement.

We think the conclusions of the Circuit Court of Appeals are right, and its judgment is

*Affirmed.*

MR. JUSTICE HOLMES concurs in the judgment.